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In The

# Supreme Court of the United States

October Term, 1997

RAYMOND J. DIRUSSA,

*Petitioner,*

v.

DEAN WITTER REYNOLDS, INC.
and LAWRENCE J. SOLARI, JR.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI

BRUCE P. MCMORAN
*Counsel of Record*
JOHN J. BARRY
MICHAEL F. O'CONNOR
BARRY AND MCMORAN, P.C.
One Newark Center
Newark, New Jersey 07102
(973) 624-6500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTIONS PRESENTED

A. Whether a prevailing claimant in a discrimination case brought under the Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 621 *et seq.*, may be denied the Congressionally mandated remedy of attorney's fees because: (a) this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), required him to pursue his employment discrimination claim before arbitrators rather than before the courts; (b) the arbitrators disregarded the Congressional mandate requiring the award of attorney's fees; and, (c) both the district court and the court of appeals concluded that it was not their responsibility either to correct the clearly erroneous ruling of the arbitrator or to enforce this Court's assurance in *Gilmer* that "review [of arbitration awards would be] sufficient to ensure that arbitrators comply with the requirements of the statute . . . ?"

B. Whether *Gilmer* requires the lower courts to modify or vacate an arbitration award that denies attorney's fees mandated by the ADEA to a party who prevails on his age discrimination claim?

## PARTIES TO THE PROCEEDINGS

All of the parties to the proceedings in the United States Court of Appeals for the Second Circuit appear in the caption to this Petition.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Raymond J. DiRussa petitions for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the decision in *Raymond J. DiRussa v. Dean Witter Reynolds Inc. and Lawrence J. Solari, Jr.*, reported at 121 F.3d 818 (2d Cir. 1997).

## OPINIONS BELOW

The Award of the arbitration panel of the National Association of Securities Dealers ("NASD"), #92-04232, awarding DiRussa $220,000 in compensatory damages for age discrimination but denying his application for mandatory attorney's fees is reprinted in the appendix hereto. (App. 31, *infra.*)

The Memorandum and Order of the United States District Court for the Southern District of New York (Haight, D.J.), dated July 24, 1996, and reported at 936 F.Supp. 104 (S.D.N.Y. 1996), denying DiRussa's motion to vacate or modify the arbitration award and granting Dean Witter's motion to confirm the arbitration award are reprinted in the Appendix hereto (App. 23, *infra.*). The Judgment of the United States District Court for the Southern District dated July 31, 1996 denying DiRussa's motion to vacate or modify the arbitration award and granting Dean Witter's motion to confirm the arbitration award and entering judgment in favor of DiRussa against Dean Witter and Lawrence J. Solari, Jr. is reprinted in the appendix hereto. (App. 43, *infra.*)

The Opinion and Judgment of the Court of Appeals for the Second Circuit, dated August 5, 1997 and reported at 121 F.3d 818 (2nd Cir. 1997), affirming the judgment of the United States District Court for the Southern District of New York, are reprinted in the appendix hereto. (App. 1, *infra*.)

## JURISDICTION

The Opinion of the Court of Appeals for the Second Circuit was filed and entered on August 5, 1997. The time for filing this petition runs from this date. Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

The federal and state statutory provisions and NASD Regulations involved in this case are lengthy and are set forth verbatim in the Appendix pursuant to Rule 14(f). They are the Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 623 (App. 61), 626(b),(c) (App. 61-62), the Federal Arbitration Act 9 U.S.C. §§ 1, 2 (App. 63), the New Jersey Law Against Discrimination, N.J. Stat. Ann. §§ 10:5-3 (App. 64), 10:5-12(a) (App. 65), 10:5-13 (App. 67), and 10:5-27.1 (App. 69), and the NASD Code of Arbitration Procedures §§ 9 (App. 70), 46(c)(1) (App. 71) (1995).

## STATEMENT OF THE CASE

On May 8, 1992, Raymond J. DiRussa, then age fifty-eight, was removed from his position of Branch Manager with Dean Witter Reynolds, Inc. ("Dean Witter"), after almost forty-two years with the Company. Initially, DiRussa filed a charge of employment discrimination under the Age Discrimination in Employment Act ("ADEA") with the Equal Employment Opportunity Commission ("EEOC") and under the New Jersey Law Against Discrimination ("NJLAD") with the New Jersey Division on Civil Rights. When the EEOC declined to pursue DiRussa's claim, he submitted it to an arbitration panel of the National Association of Securities Dealers ("NASD"), as required by his registration application as a securities representative and in accordance with this Court's ruling in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) which compelled arbitration of age discrimination claims under the ADEA in similar circumstances. His claim charged Dean Witter with unlawful employment discrimination under the ADEA and the NJLAD and requested all statutory remedies, including attorneys fees. (App. 55, 59-60)

In accordance with the NASD *Code of Arbitration Procedure*, §§ 9(b)(ii) and 46(c)(1) (App. 70, 71), the arbitration panel (the "panel") consisted of three arbitrators from the securities industry, two of whom were lawyers, including one lawyer who was responsible for personnel and labor matters in the firm in which she worked.

Following seven days of hearings over six months, the panel rendered its award without a written opinion on March 14, 1995. (App. 39, 40) It found that Dean Witter

and DiRussa's supervisor, Lawrence J. Solari, Jr. ("Solari"), had discriminated against DiRussa because of his age and awarded him $220,000 in compensatory damages. However, in contravention of the statutory requirements of both the ADEA and the NJLAD mandating an award of attorney's fees to DiRussa as a prevailing claimant, the panel inexplicably denied DiRussa's application for the statutorily required counsel fees without explanation. (App. 38, 39, 60) The undisputed amount of those fees is $249,010.50. Thus, the arbitration panel granted DiRussa a truly Pyhrric victory: a damages award that was $29,000 *less* than the attorney's fees application.

DiRussa filed a complaint in the United States District Court for the Southern District of New York under 28 U.S.C. § 1332, requesting the court, *inter alia*, to vacate the arbitration award or modify it to include attorneys' fees. (App. 45, 51) Dean Witter opposed the application and moved to confirm the arbitration award. The district court agreed that the ADEA explicitly mandated an award of attorneys' fees to DiRussa stating that "it is difficult to imagine a more well defined, explicit and clearly applicable provision of governing law than the ADEA's mandate that successful age discrimination claimants such as plaintiff recover attorney's fees." (App. 26) Nonetheless, the court denied DiRussa's motion to vacate or modify the award. Instead, it granted Dean Witter's motion to confirm the award, holding that the panel, in refusing to award statutorily required counsel fees, did not act in "manifest disregard" of the law as that standard of review of arbitration awards is applied in the Second Circuit. (App. 27-28, 30)

The United States Court of Appeals for the Second Circuit affirmed the district court. While agreeing with the district court that the ADEA explicitly mandated an award of attorneys' fees to DiRussa as a successful age discrimination claimant (App. 8), the Second Circuit ruled that the severely limited scope of its review of arbitration awards under the manifest disregard standard precluded it from remedying the admittedly clear disregard of the ADEA statute committed by the arbitration panel when it denied DiRussa's request for attorneys' fees. (App. 11, 17) It held, bluntly, that although the arbitrators should have awarded DiRussa attorney's fees, "the remedy does not lie with us." (App. 11)

Thus, despite the fact that DiRussa succeeded in his claim of age discrimination and as such was entitled to an award of attorney's fees under both the ADEA and NJLAD[1], the arbitration panel, the district court and the court of appeals disregarded the clear direction of Congress that his award include attorney's fees. By doing so, each of the tribunals made a mockery of this Court's pronouncement in *Gilmer*, that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue." 500 U.S. at 32 n.4.

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[1] Obviously, DiRussa was entitled only to a single award of counsel fees since NJLAD simply functions in cases where both it and the ADEA apply as an additional statutory ground for this relief.

## I.

## THIS COURT MUST ESTABLISH A STANDARD OF REVIEW OF ARBITRATION AWARDS TO ENSURE THAT EMPLOYMENT DISCRIMINATION VICTIMS ARE NOT DENIED THE SUBSTANTIVE STATUTORY RIGHTS AND REMEDIES PROVIDED BY CONGRESS

For years this Court with good reason distrusted arbitration as a forum for deciding statutory claims. *See, e.g., Wilko v. Swan*, 346 U.S. 427 (1953); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981). This Court reasoned that Congress vested the courts with the responsibility for enforcement of laws and that arbitrators lacked the legal expertise necessary to effectively apply federal statutes, especially broadly-worded civil rights statutes designed to ensure equal employment opportunity. *Alexander, supra*, 415 U.S. at 56-57; *Barrentine, supra*, 450 U.S. at 740, 743. The Court further recognized that the problems created by the lack of arbitrator expertise were compounded by the fact that meaningful judicial review of arbitration awards would be inhibited because arbitrators were not required to issue reasoned written opinions. *Wilko*, 345 U.S. at 436-437. Thus, this Court historically disfavored arbitration as a forum for enforcing statutory rights and remedies.

However, in the mid-1980s, this Court departed from its long-held view that arbitration did not provide a viable forum for deciding statutory claims. Starting in 1985 with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (permitting arbitration of statutory antitrust claims), every two years the Court decided a case which extended the scope of compulsory

arbitration to a new class of statutory commercial claims that previously were heard only in the courts. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (claims arising under the Securities Exchange Act of 1934); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (claims arising under the Securities Exchange Act of 1933 and civil provisions of the Racketeer Influenced and Corrupt Organizations Act). While these cases extended arbitration to statutory matters which were previously the sole responsibility of the courts, the class of disputes was limited to commercial matters.

In 1991, this Court extended the scope of compulsory arbitration from commercial disputes to statutory employment discrimination claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 23. In *Gilmer*, the Court held that agreements requiring employees to submit claims arising out of their employment to arbitration were enforceable and applied to statutory age discrimination claims. *Id.* The *Gilmer* decision went far beyond the reach of *Mitsubishi* and its progeny, which had accepted arbitration as a favored means of resolving commercial disputes. For the very first time, the Court concluded that arbitrators were as capable as the courts in deciding employees' claims of infringement of the statutory civil rights laws which Congress had enacted to achieve broad public policy goals through judicial enforcement mechanisms, laws that were designed to protect employees from discrimination by the very same employers who advocated arbitration of these claims. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; Civil Rights

Act of 1991, 42 U.S.C. § 1987 *et seq.*; Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*

In permitting arbitration of statutory civil rights laws, the *Gilmer* court necessarily and explicitly premised its holding upon the proposition that, by agreeing to arbitration, victims of discrimination would not lose any of the substantive rights or remedies which the statutes provided but would simply trade their right to have a claim heard in a jury trial for arbitration. *Id.*, 500 U.S. at 26. In so doing, the Court assured the public that if arbitrators failed to enforce the statutory rights and remedies mandated by Congress, then the courts would do so. *Id.*, 500 U.S. at 32, n.4. This case squarely puts that assurance to the test because DiRussa was totally deprived of his statutory right as a prevailing party to counsel fees.

If this Court permits the decisions below to stand uncorrected, it makes a mockery of its entire rationale for denying victims of discrimination the right to pursue Congressionally mandated remedies in the courts. Obviously, the arbitrators who decided DiRussa's case either lacked the "expertise" to comply with an explicit statutory command or chose to ignore it. Equally obviously, the lower courts chose to turn a blind eye to the unjust result inflicted on DiRussa and the clear thwarting of the Congressional mandate. If, as this Court made clear in *Gilmer*, the courts have ultimate responsibility for ensuring compliance with statutory mandates, then the lower courts in this case have shirked that responsibility by ruling that the remedy does not lie with them.

As the result in DiRussa's case shows, the absence of initiative on the part of the lower courts and the absence of direction from the Court has operated unjustly to deny victims of discrimination the statutory rights and remedies to which they are clearly entitled. While the Second Circuit recognized the dilemma caused by its ruling, its answer, "the remedy does not lie with us", (App. 11), requires this Court to provide the remedy. It is no answer to say that the remedy lies with Congress. It was this Court, not Congress, that created the problem by empowering employers to force employee-victims of discrimination into an arbitration process which totally disregards rights created by Congress; and, it was this Court, not Congress, that assured the citizenry that the courts would correct any failure on the part of the arbitrators to enforce the statutory rights and remedies mandated by Congress.

The court of appeals abdicated its responsibility to implement this Court's assurance that victims of discrimination would not lose their substantive rights when compelled to arbitrate their statutory claims. By its abdication, the Second Circuit has rendered illusory this Court's promise in *Gilmer* that "by agreeing to arbitrate a statutory claim, a [victim of discrimination] does not forgo the substantive rights afforded by the statute . . . ," 500 U.S. at 26, because when such victims find their substantive rights trammelled in arbitration, they have no redress available in the courts.[2]

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[2] It is more than a bit ironic that the securities industry which argued in favor of arbitration of ADEA claims in *Gilmer* (and which compels present and prospective employees to

The manifest disregard of law standard of review as applied by the Second Circuit in the case at bar is far too limited to achieve the effect intended by this Court in *Gilmer*, because it permits reversal of an arbitration award in only the narrowest of circumstances where it can be shown that the arbitrators (who are under no burden of explanation) subjectively determined to refuse to apply controlling law. Even when, as here, as an indisputable, absolute fact, the arbitrators have no discretion to deny a mandatory statutory remedy and yet do so, the subjective manifest disregard standard of review effectively precludes a reviewing court from enforcing the mandatory statutory rights and remedies which Congress enacted to protect the very same employees from discrimination by their employers.

The District of Columbia Circuit Court of Appeals has recognized the need to reconcile the limitations of the manifest disregard standard of review of arbitration awards with the Court's assurance in *Gilmer* that victims will not lose their statutory rights and remedies. *See Cole v. Burns International Securities Services*, 105 F.3d 1465, 1487 (1997). In *dicta*, that court stated, "the manifest disregard of law standard must be defined in light of the bases underlying the Court's decisions in *Gilmer* type cases," observing that the Court's "twin assumptions [that parties do not forego substantive rights by agreeing to arbitrate a statutory claim and that judicial review will ensure compliance with statutory requirements] are valid only if

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"agree" to arbitration in advance of accrual of claims) argued *against* the award of attorneys' fees to a victim of discrimination below.

judicial review under the manifest disregard of the law standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law." *Id.*

Had DiRussa's claims been heard in a judicial forum as provided by statute, it is almost impossible to conceive either that a trial court would have made the clear error of denying his claims for attorney's fees or that, if it did, a reviewing court would not have promptly termed such a ruling plain error.[3] *Cf. Johnson v. United States*, ___ U.S. ___, 117 S.Ct. 1544 (1997) (discussion of plain error). Under *Gilmer*, the same result must obtain when the forum has been changed from the courts to arbitration; otherwise, contrary to *Gilmer*, the change in forum vitiates the statutory rights and remedies provided by Congress. The plain disregard by an arbitrator of a statutory mandate cannot be permitted to deprive a prevailing age discrimination claimant of his substantive right to attorney's fees. If it can, then a person who has been required to sign a standard industry-wide contract of adhesion to submit his claim to arbitrators, has relinquished not only the statutory forum but also his substantive statutory rights.

As the decision of the Second Circuit highlights when it states "the remedy does not lie with us", (App. 11) there is a glaring and immediate need for an appropriate standard of review which permits a reviewing court to

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[3] Indeed, had DiRussa's case proceeded in the courts, plain error analysis would have been unnecessary because DiRussa specifically claimed entitlement to attorney's fees under the ADEA and NJLAD in the arbitration proceeding. (App. 9, 38, 60).

remedy plain, positive law error. This Court has the authority to prevent the abuse of statutory rights which occurred here (and no doubt will reoccur). Therefore, this Court should grant certiorari to establish a standard of review of arbitration decisions which ensures that the promise of *Gilmer* is kept and employment discrimination victims are not deprived of their statutory rights and remedies.

## II.

## THIS COURT MUST ESTABLISH A STANDARD OF REVIEW OF ARBITRATION AWARDS TO ENSURE THAT THE CLEAR PUBLIC POLICIES UNDERLYING THE ATTORNEY'S FEES PROVISION OF THE ADEA ARE NOT THWARTED BY ARBITRATOR IGNORANCE OF OR INDIFFERENCE TO THOSE POLICIES

Both the ADEA and the NJLAD mandate an award of attorney's fees to a successful age discrimination claimant. 29 U.S.C. § 626(b) (incorporating by reference 29 U.S.C. § 216(b)); *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995) (attorney's fees are mandatory under ADEA); N.J. Stat. Ann. § 10:5-27.1; *Rendine v. Pantzer*, 276 N.J. Super. 398, 462, 648 A.2d 223, 254 (App. Div. 1994), *aff'd*, 141 N.J. 292, 661 A.2d 1202 (1995) (attorney's fees are mandatory under NJLAD). Attorney's fees are a special form of relief designed to encourage individuals injured by discrimination to seek judicial relief to vindicate important civil rights. *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989); *Shaner v. Horizon Bancorp.*, 116 N.J. 433, 439, 561 A.2d 1130, 1133 (1989). The fee-shifting provisions thereby effectuate the public policy of eradicating

discrimination through private actions, "a policy Congress deemed to be of the highest priority." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968)).

In this matter, DiRussa prevailed on his age discrimination claim against Dean Witter and applied for attorney's fees under the ADEA and NJLAD. Although Dean Witter did not oppose DiRussa's application for fees, or the amount claimed, the panel, without explanation, denied DiRussa's application for fees. The panel's decision, thus, both deprived DiRussa of a substantial right and simultaneously undercut and undermined the explicit, well-defined and dominant policy of eradicating discrimination by awarding attorney's fees to successful age discrimination claimants to encourage victims to pursue discrimination claims.

DiRussa sought vacation of, or in the alternative, modification of the arbitration award to include attorney's fees in the district court. The district court rebuffed that application while expressly recognizing the explicit, well-defined and dominant policy that mandated an award of attorney's fees to DiRussa, observing that "it is difficult to imagine a more single well-defined, explicit and clearly applicable provision of governing law than the ADEA's mandate that successful age discrimination claimants such as [DiRussa] recover attorney's fees." (App. 26). Its decision to deny DiRussa's motion to vacate or modify the award, therefore, was clearly wrong, not simply because DiRussa's substantive right to attorney's fees was not upheld but also because it left uncorrected a clear violation of a powerful Congressional policy

designed to effectuate a national commitment to eradicate discrimination in the workplace.

DiRussa appealed to the United States Court of Appeals for the Second Circuit, expressly contending that the arbitration award conflicted with the public policies reflected in the positive law embodied in the ADEA and NJLAD. Like the district court, the Second Circuit recognized that the ADEA mandates an award of attorney's fees to a successful age discrimination claimant. (App. 8). It also acknowledged the injustice DiRussa suffered by the Panel's denial of mandatory attorney's fees, an injustice it impliedly blamed on *Gilmer*'s failure to set standards of review for arbitration awards involving statutory employment discrimination claims. (App. 11, 17) It refused, however, to correct the injustice by holding that "the remedy for that does not lie with us." (App. 11).

The court of appeals additionally took an extremely narrow view of its obligation to uphold the powerful public policies affected by this case. It incorrectly stated that "DiRussa contends in effect that arbitration awards violate public policy whenever an arbitrator erroneously interprets federal statutory law." (App. 16) The Second Circuit missed the point which DiRussa made and which *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42-44 (1987) squarely holds, i.e., courts have an obligation to set aside arbitration awards which conflict with "explicit, well-defined and dominant" public policies such as the attorney fees provisions of the ADEA and NJLAD. DiRussa did not argue an expansion of the public policy ground for reversing an arbitration award. Rather, under *Misco*, DiRussa identified a demonstrably explicit, well-defined and dominant public policy

with which the arbitration panel's denial of attorney's fees directly conflicted.

Just as it found a dilemma to exist between the policies of limited review of arbitration and that of guaranteeing victims of discrimination the substantive rights and remedies Congress has provided, a court-created dilemma for which it decided that "the remedy does not lie with us" (App. 11), the court of appeals created a comparable dilemma to deal with the thwarting of clear Congressional policy. It ruled that it was unclear "where to draw the line in determining whether the public policy [attorney's fees] is important enough to require us to vacate an award." (App. 16). Given the brightness of the line on attorney's fees as the enforcement mechanism on which Congress relies to eradicate discrimination from the workplace, DiRussa respectfully submits that there is nothing unclear about where to draw the line – Congress has explicitly drawn it.

The District of Columbia Circuit recognized that the manifest disregard standard of review as typically applied in lower federal courts was totally inadequate to protect individual statutory rights in *Cole v. Burns International Securities*, 105 F.3d 1465, 1486-1487 (1997), where it advocated a less deferential standard of review of arbitration awards "defined in light of the bases underlying the Court's decision" in *Gilmer* and "sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law." 105 F.3d 1487. The Second Circuit also questioned whether a less deferential standard of review would be appropriate in reviewing awards involving statutory rights but declined to address the issue.

(App. 17) Neither court of appeals, however, has seriously considered much less resolved the underlying conflicts between the public policies requiring attorney's fees and the deferential standard of review of arbitration awards.

As this Court made clear, however, reviewing courts not only have the power, but also the obligation, to set aside arbitration awards that conflict with "explicit, well-defined and dominant" public policies. *Misco*, 484 U.S. at 42-44 (citing *W.R. Grace*, 461 U.S. at 766); *see, also, Gilmer*, 500 U.S. at 32 n.4 (courts will review arbitral decisions for statutory conformity). A public policy is "explicit, well-defined and dominant" when it may be "ascertained by reference to laws and legal precedents." *Misco*, 484 U.S. at 42-44. As *Gilmer* makes clear, review of an arbitral decision that contravenes a statute that animates a public policy "is sufficient to ensure that arbitrators comply with the requirements of the statute at issue." 500 U.S. at 32 n.4.

The public policy of encouraging victims of discrimination to vindicate their civil rights in court, and thus contribute to the societal goal of eliminating age discrimination in the workplace, is certainly "explicit, well-defined and dominant" as the Court applies those terms in *W.R. Grace* and *Misco* and as both the district court and court of appeals recognized below. Indeed, as the district court noted, "It is difficult to imagine a more single well-defined, explicit and clearly applicable provision of governing law than the ADEA's mandate that successful age discrimination claimants such as [DiRussa] recover attorney's fees." (App. 26)

The panel's denial of attorney's fees to DiRussa flagrantly violates the well-defined and dominant public policy of ensuring claimants access to competent counsel and encouraging private actions to enforce civil rights. The panel's award not only discourages victims of discrimination from bringing claims, but also deters private attorneys who would represent such victims from taking such cases because they may not get paid despite successfully prosecuting an age discrimination claim, contrary to this policy.

The decisions of the lower courts in this case thus thwart Congress' purposes in enacting the mandatory fee provision of the ADEA. Congress mandated the remedy of attorney's fees to successful age discrimination claimants to ensure that competent counsel was available to individual victims of discrimination. *Blanchard v. Bergeron*, 489 U.S. at 95. It intended to encourage successful civil rights litigation, *Id.*, and deter civil rights violations. *McKennon*, 513 U.S. at 358, 363. The NJLAD also mandates an award of attorney's fees to a prevailing age discrimination claimant, *Rendine*, 276 N.J. Super. at 462, 648 A.2d at 254, *aff'd*, 141 N.J. 292, 661 A.2d 1202 (1995) (interpreting N.J.Stat.Ann. 10:5-27.1), to encourage private actions based on unlawful discrimination. *Shaner v. Horizon Bancorp*, 116 N.J. at 439, 561 A.2d at 1133. If these decisions do not unequivocally bespeak a clear, well-defined and dominant public policy, it is difficult to conceive what further clarification would be required.

Employment discrimination statutes were designed to protect individual employees and society at large from discrimination. If arbitration of these disputes is to be required, then courts must exercise judicial review of

arbitration awards sufficient to ensure that the arbitrators comply with statutory requirements so that the clear, well-defined and dominant policies underlying these statutes are given effect and victimized employees are not denied the rights and remedies to which Congress has determined they are entitled. Otherwise, the individual employees who are the beneficiaries of the discrimination laws enacted by Congress will not receive the protection which Congress intended for them. This Court should grant certiorari to establish a standard of review which requires arbitrators to follow statutory requirements to give effect to the public policies underlying the rights and remedies granted to individual employees by Congress when enacting the discrimination statutes.

## CONCLUSION

This Court should issue a Writ of Certiorari to establish a standard of review of statutory employment discrimination arbitration awards so that this Court's assurance in *Gilmer* that "review [of arbitration awards will be] sufficient to ensure that arbitrators comply with the requirements of the statute . . . " is met and that victims of discrimination are not denied statutorily mandated rights and remedies such as attorneys fees.

Respectfully submitted,

BRUCE P. MCMORAN
*Counsel of Record*
JOHN J. BARRY
MICHAEL F. O'CONNOR
BARRY AND MCMORAN
One Newark Center
Newark, New Jersey 07102
(973) 624-6500

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 1430 – August Term 1996

Argued: May 7, 1997 Decided: August 5, 1997

Docket No. 96-9068

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RAYMOND J. DIRUSSA,

*Plaintiff-Appellant,*

-against-

DEAN WITTER REYNOLDS, INC.
and LAWRENCE J. SOLARI, JR.,

*Defendants-Appellees.*

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Before:

FEINBERG, OAKES and LEVAL,

*Circuit Judges.*

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Appeal from judgment in the United States District Court for the Southern District of New York, Charles S. Haight, Jr., J., confirming an arbitration award. 936 F.Supp. 104 (S.D.N.Y.1996). The Second Circuit, Feinberg, J., held that (1) the district court properly denied plaintiff's motion to vacate or modify award to include attorney's fees, and (2) the district court did not abuse its discretion by granting defendants' motion to seal the entire file except for the court's orders and opinions. Affirmed.

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BRUCE P. MCMORAN, Newark, NJ (Barry & McMoran, John J. Barry, Colleen D. Shiarella, Diane Schulze, of Counsel), *for Plaintiff-Appellant.*

RONALD M. GREEN, New York, NY (Epstein Becker & Green, P.C., of Counsel), *for Defendants-Appellees.*

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FEINBERG, Circuit Judge:

This case implicates the possible clash between two important federal policies: deference to arbitration awards in order to promote that important method of dispute resolution and enforcement of the remedial provisions of a federal statute – the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq. Plaintiff Raymond J. DiRussa appeals from a judgment in the United States District Court for the Southern District of New York, Charles S. Haight, Jr., J., denying DiRussa's motion to vacate or modify an arbitration award to include an award of attorney's fees and granting a cross-motion by defendants Dean Witter Reynolds, Inc. (Dean Witter) and Lawrence J. Solari, Jr., a regional director at Dean Witter, to confirm the award. DiRussa v. Dean Witter Reynolds, Inc., 936 F.Supp. 104 (S.D.N.Y.1996). The district court also granted defendants' motion to seal the entire file except for the court's orders and opinions. Id. at 108. For reasons stated below, we affirm.

## I. Facts and Prior Proceedings

In May 1992, DiRussa was demoted by Dean Witter from the position of Branch Manager of its Ridgewood, New Jersey office to the position of Account Executive in the Morristown, New Jersey office. DiRussa was then 58 years old. DiRussa objected to the demotion and challenged it through arbitration before the National Association of Securities Dealers, Inc. (NASD), as required under the terms of his employment. DiRussa claimed that defendants had discriminated against him based on his age in violation of ADEA and the New Jersey Law Against Discrimination (NJLAD), N.J. Stat. Ann. 10:5-1 et seq.

As set forth in the arbitrators' award, defendants maintained that DiRussa was demoted because of (1) the poor performance of the Ridgewood branch compared to competitors in the same geographic area, (2) his inappropriate conduct with supervisors and subordinates, and (3) his failure to adequately explain to Solari and Robert Dwyer, Dean Witter's National Director of Sales, how he intended to increase his branch's performance. DiRussa countered that these reasons were pretextual, offering evidence that, despite his "competent and conscientious" performance as Branch Manager, he was demoted because of his age. DiRussa introduced testimony during the arbitration that, among other things, Solari and Dwyer "back-dated" a memorandum from them to DiRussa requesting information from DiRussa regarding improvement of his branch and surreptitiously placed that memorandum in DiRussa's personnel file without ever transmitting it to him.

In March 1995, after holding hearings on seven days between June and December 1994 at which both sides were represented by counsel, the arbitrators awarded DiRussa $200,000 in compensatory damages jointly and severally against both defendants and an additional $20,000 against Solari. Although the arbitrators acknowledged in the award that DiRussa also sought, among other things, punitive damages and "attorney's fees and costs of suit pursuant to the ADEA and NJLAD," the award explicitly denied all other relief.

In June 1995, DiRussa filed this complaint in the district court seeking to modify the award to include $249,050.10 in attorney's fees, and to increase the amount of damages awarded. Thereafter, defendants requested the district court to seal the entire file in the case, alleging that DiRussa's failure to file the action under seal violated a confidentiality agreement entered into by the parties during the course of the NASD arbitration. Despite DiRussa's objection that defendants' request went beyond the terms of the agreement, in an opinion dated July 7, 1995 (the July 1995 opinion) the district court placed the file under seal pending further order. The court ordered counsel for both sides to "confer with each other forthwith in a good faith effort to agree upon the documents, if any, that should be retained under seal. If counsel cannot agree, defendants have the burden of demonstrating on appropriate papers that the disputed items fall within the confidentiality agreement."

After various motions and cross-motions, the district court held, in an opinion dated July 24, 1996 (the July 1996 opinion), that there was no ground on which the arbitration award could be vacated or modified to

include attorney's fees or a different damage calculation. The court also ruled that the entire file would remain under seal, with the exception of the court's orders and opinions in the case, because it was "not feasible to attempt a partial unsealing within the context of the parties' confidentiality agreement." This appeal followed. In October 1996, we granted defendants' motion to seal all documents submitted in this court that were also subject to the district court's sealing order.

## II. Discussion

On appeal, DiRussa argues that the arbitration award should be modified to include attorney's fees and that the district court erred in sealing the file. In reviewing a district court's decision confirming an arbitration award, we review legal issues de novo and findings of fact for clear error. First Options of Chicago, Inc. v. Kaplan, 115 S.Ct. 1920, 1926 (1995); International Telepassport Corp. v. USFI, Inc., 89 F.3d 82, 85 (2d Cir. 1996). We have often explained that "[a]rbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997) (internal quotes omitted). DiRussa argues that modification of the award to include attorney's fees is warranted by both Section 10 of the Federal Arbitration Act (FAA), 9 U.S.C. § 10, and several judicially-created grounds for vacating such awards. We consider each argument in turn, but ultimately hold that the district court did not err in confirming the award.

A. Manifest Disregard of the Law

DiRussa argues that the award should be modified because the arbitrators engaged in "manifest disregard of the law" by failing to award attorney's fees under the ADEA and NJLAD. Although we have often recognized this judicially-created ground for modifying or vacating an arbitration award, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986) (citing Wilko v. Swann, 346 U.S. 427, 436-37 (1953)); Carte Blanche (Singapore) PTE., Ltd. v. Carte Blanche Int'l, Ltd., 888 F.2d 260, 265 (2d Cir. 1989), we have also emphasized that the reach of the manifest disregard doctrine is "severely limited." Government of India v. Cargill Inc., 867 F.2d 130, 133 (2d Cir. 1989). Indeed, we have cautioned that manifest disregard "clearly means more than error or misunderstanding with respect to the law." Bobker, 808 F.2d at 933.

> The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.

Id. Thus, to modify or vacate an award on this ground, a court must find both that (1) the "arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether," and (2) the "law ignored by the arbitrators . . . [was] 'well defined, explicit, and clearly applicable' " to the case. Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 112 (2d Cir. 1993) (internal citations omitted); Bobker, 808 F.2d at 933-34.

As an initial matter, DiRussa argues that the manifest disregard standard, which gives extreme deference to arbitrators, should not apply in cases where arbitrators construe federal statutes rather than decide simply the usual issues in typical commercial or labor disputes. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (holding for the first time that ADEA claims are subject to compulsory arbitration). In support of this argument, DiRussa cites Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C.Cir. 1997) (upholding order compelling arbitration of Title VII claim), in which the D.C. Circuit expressed its view that

> [t]he nearly unlimited deference paid to arbitration awards in the context of collective bargaining is not required, and not appropriate, in the context of employees' statutory claims [because] [i]n this context, the Supreme Court has assumed that arbitration awards are subject to judicial review sufficiently rigorous to ensure compliance with statutory law.

Id. at 1468-69; cf. Chisolm v. Kidder, Peabody Asset Management, Inc., 1997 WL 289621 at *6-10 (S.D.N.Y.1997) (discussing but rejecting argument that a "different manifest disregard standard" should apply to statutory claims). DiRussa similarly contends that a federal court has an "obligation to ensure that statutory rights . . . [are] protected in the arbitral forum" and to vacate an award when arbitrators engage in an "obvious abuse of power" by denying a remedy required by statute.

Defendants counter that DiRussa waived this argument by not raising it in the district court. They point out that the sole issue raised in DiRussa's complaint was

whether the arbitrators "acted in manifest disregard of the law in failing to award" attorney's fees. We ordinarily will not decide an issue first presented on appeal unless "necessary to avoid manifest injustice." Mellon Bank, N.A. v. United Bank Corp. of New York, 31 F.3d 113, 116 (2d Cir. 1994) (internal quotes omitted). We see no injustice in confining our review on appeal to the issue as framed by DiRussa in the district court.

We thus turn to the principal question that has been properly raised: whether the arbitrators in this case manifestly disregarded the law by not awarding attorney's fees under the ADEA and NJLAD.

(1) Attorney's Fees Under the ADEA

Section 626(b) of the ADEA, 29 U.S.C. § 626(b), incorporates by reference 29 U.S.C. § 216(b) of the Fair Labor Standards Act, which states, in relevant part, that "[t]he court . . . *shall*, in addition to any judgment awarded to the plaintiff, . . . allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." (emphasis added); see Hagelthorn v. Kennecott Corp., 710 F.2d 76, 86 (2d Cir. 1983) (award of attorney's fees to prevailing plaintiff is mandatory). The district court found that "it is difficult to imagine a more 'well defined, explicit and clearly applicable' provision of governing law than the ADEA's mandate that successful age discrimination claimants such as plaintiff recover attorney's fees." DiRussa, 936 F.Supp. at 106. With this much of DiRussa's argument we agree.

However, we also agree with the district court's conclusion that the arbitrators did not manifestly disregard the law, because there is no persuasive evidence that the arbitrators actually knew of – and intentionally disregarded – the mandatory aspect of the ADEA's fee provision. The arbitrators did not state their reasons for denying DiRussa attorney's fees, nor were they required to do so. See Standard Microsystems, 103 F.3d at 12 (citing United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960)). We are thus faced with the "difficult task" of inferring from the facts of the case whether the arbitrators "appreciate[d] the existence of a clearly governing legal principle but decide[d] to ignore or pay no attention to it." Standard Microsystems, 103 F.3d at 12-13 (internal quotes and citations omitted).

DiRussa argues that we should assume that the arbitrators knew that the ADEA mandated attorney's fees to prevailing plaintiffs because he indicated several times during the arbitration that he was "entitled" to such fees under that statute. We observe that DiRussa stated on several occasions, including the statement of his claims that the arbitrators received into evidence at the first hearing, that he sought attorney's fees under both the ADEA and NJLAD. Similarly, DiRussa argued in his opening statement to the arbitrators, and in his "Brief in Support of [His] Application for Punitive Damages, Liquidated Damages and Attorney's Fees," that he was "entitled to" attorney's fees under the ADEA.

However, DiRussa misses the point. The arbitrators obviously knew that DiRussa was requesting attorney's fees under the ADEA (and NJLAD) because they stated in their award that DiRussa sought "attorney's fees and

costs of suit pursuant to the ADEA and NJLAD." Nevertheless, at no point did DiRussa communicate – either by written submission or orally – to the arbitrators that the ADEA *mandated* such an award to a prevailing party. Indeed, in what is apparently the only brief DiRussa submitted to the arbitrators regarding attorney's fees, he focused exclusively on NJLAD's provisions regarding the "lodestar" calculation of attorney's fees and whether upward enhancement of that figure was warranted. Nowhere in this submission does DiRussa either explain that the ADEA *requires* an award of attorney's fees or quote the language of the relevant ADEA section, which clearly communicates that principle. In view of DiRussa's failure to inform the arbitrators of the relevant legal standard, we are hard-pressed to infer that they consciously disregarded the ADEA's fee provisions.

DiRussa insists that his use of the phrase "entitled to" when discussing attorney's fees under the ADEA indicated to the arbitrators that they had no discretion to deny such fees. It is true that the phrase "entitled to" could convey the idea that *as a matter of law* attorney's fees were required once the arbitrators awarded DiRussa damages for age discrimination. However, it is equally plausible that the arbitrators interpreted the phrase as a statement of DiRussa's belief that the arbitrators should *exercise discretion* to award him fees because he was particularly deserving of such an award. Indeed, it would not be surprising for them to assume this latter meaning in view of the fact that "many" statutes providing for attorney's fees to prevailing parties leave the decision

whether to award such fees to the discretion of the decision-maker, in this case the arbitrators. See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 415-16 (1978).

Finally, DiRussa counters that although there is no direct evidence that the arbitrators consciously ignored this provision of the ADEA, "[t]he controlling legal principle and subsequent error is so obvious to the average qualified arbitrator that any different conclusion is absurd." We disagree. We sympathize with the district court's view that "the securities industry, having persuaded the Supreme Court in *Gilmer* to require arbitration of employees' ADEA claims, should be required to supply arbitrators who know what the ADEA says about attorney's fees." 936 F.Supp. at 107. But the remedy for that does not lie with us.[1] Moreover, "knowing" all of the

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[1] We note that there has been much recent debate regarding the wisdom of the practice in the securities industry of requiring employees to arbitrate claims of employment discrimination. The NASD has formed a six-member panel to consider elimination of its requirement that all employees sign a form consenting to mandatory arbitration of such claims before an NASD-sponsored arbitration panel. Patrick McGeehan, Bias Panel Is Formed by NASD: Arbitration System to Undergo Review, Wall St. J., May 29, 1997, at C1. Two United States Representatives, Edward Markey, D-Mass., and Constance Morella, R-Md., have introduced legislation that would preclude employers from requiring as a condition of employment arbitration of future claims of employment discrimination. John C. Coffee, J., Sex and the Securities Industry, N.Y.L.J., May 29, 1997, at 5-6 (also noting that SEC Commissioner Isaac C. Hunt, Jr. and the National Arbitration and Mediation Committee have spoken out against mandatory arbitration of employment discrimination claims).

provisions of a particular statutory scheme without assistance from the parties is a daunting task, even for a skilled lawyer or judge. DiRussa argues that "[a] competent and conscientious panel, knowing it was being called upon to enforce federal and state anti-discrimination statutes, would be sure to review these statutes in order to ensure its compliance therewith and would request briefing from the parties on any issue on which it was unclear." While this would be a prudent course of action for arbitrators dealing with statutory claims, we agree with the district court that their failure to do so did not constitute manifest disregard of the law.

(2) Attorney's Fees under NJLAD

We can more easily dispose of DiRussa's argument that the arbitrators manifestly disregarded NJLAD's provision governing attorney's fees. Unlike the ADEA, NJLAD does not by its express terms provide for mandatory awards of attorney's fees to prevailing plaintiffs in discrimination cases. Rather, NJLAD states that "the prevailing party *may* be awarded a reasonable attorney's fee as part of the costs." N.J. Stat. Ann. § 10:5-27.1 (emphasis added). DiRussa cited this discretionary standard in his above-mentioned brief to the arbitrators on attorney's fees. In addition, immediately following citation of NJLAD in his brief, DiRussa cited Shaner v. Horizon Bancorp., 561 A.2d 1130, 1133 (N.J.1989), for the proposition that attorney's fees were "available as a remedy" under NJLAD. This characterization communicated to the

arbitrators that under New Jersey law, award of attorney's fees are discretionary, rather than mandatory as DiRussa now claims.

DiRussa responds that he also cited in that brief a case interpreting NJLAD to *require* an award of attorney's fees to a prevailing plaintiff, see Rendine v. Pantzer, 276 N.J.Super. 398, 648 A.2d 223 (N.J.Super.Ct.App.Div.1994), aff'd, 661 A.2d 1202 (N.J.1995), and that the arbitrators must have manifestly disregarded such authority. Buried at the end of the 23-page opinion in *Rendine* is a statement that the New Jersey legislature "has decided that non-prevailing defendants *must* pay 'reasonable' fees to prevailing plaintiffs." Id. at 255 (emphasis added). However, as with the pertinent ADEA principles, DiRussa did not quote that language to the arbitrators. As noted above, his brief on attorney's fees focused exclusively on the *amount* of fees to which he was entitled under NJLAD, not on the nature of his entitlement to fees in the first place. Thus, we cannot say that the arbitrators "knew of a governing legal principle yet refused to apply it or ignored it altogether." Folkways, 989 F.2d at 112.

B. Other Grounds for Modification

DiRussa also argues that the award must be modified because by failing to award attorney's fees (1) the arbitrators "exceeded their powers" under 9 U.S.C. § 10(a)(4), and (2) the award violates public policy. Defendants emphasize, and DiRussa does not deny, that he did not raise these arguments in the district court. In any event, neither argument warrants modification of the arbitration award.

DiRussa contends that "the Panel's power and authority was defined by the ADEA (and NJLAD) and that power and authority was exceeded when the Panel, having found a violation of the ADEA, decided not to award a statutorily required remedy." This argument misapprehends the scope of § 10(a)(4). "We have consistently accorded the narrowest reading to section 10(d) [currently section 10(a)(4)], especially when it has been invoked in the context of the arbitrators' alleged failure to correctly decide a question which all concede to have been properly submitted in the first instance." Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512, 515 (2d Cir. 1991) (internal quotes and citations omitted); Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., 579 F.2d 691, 703 (2d Cir. 1978). Our inquiry under § 10(a)(4) thus focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue. Fahnestock, 935 F.2d at 515-16.

In this case, the parties clearly submitted to the arbitrators the issue whether DiRussa was entitled to attorney's fees. Thus, though the arbitrators denied such relief, they did not "exceed their powers" as that phrase has been interpreted in our cases. Indeed, we agree with defendants that DiRussa's real objection appears to be that the arbitrators committed an obvious legal error in denying him attorney's fees. Section 10(a)(4) was not intended to apply to such a situation.

DiRussa also argues that enforcement of the award without modification to include attorney's fees violates public policy. The Supreme Court has instructed that a

court may refuse to enforce an arbitration award on this ground only when such enforcement would "violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." United Paperworkers Int'l v. Misco, Inc., 484 U.S. 29, 43 (1987) (internal quotes and citations omitted); Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840, 844 (2d Cir. 1990). This rarely-used ground for reversal "derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act." Misco, 484 U.S. at 42. The party seeking to prevent enforcement of the award must "clearly show[ ]" a violation of public policy. Id. at 43.

DiRussa claims that the award conflicts with two such policies. He first argues that awarding attorney's fees to victims of employment discrimination encourages private litigants to pursue their rights and thus contributes to the eradication of employment discrimination generally. See Christiansburg, 434 U.S. at 416. Second, DiRussa relies on the Supreme Court's repeated statement that " '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' " E.g., Gilmer, 500 U.S. at 26 (citing Mitsubishi Motors Co. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 628 (1985)); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989). DiRussa argues that these decisions express a public policy that arbitration awards must include all remedies mandated by statutory law.

Although we agree that the "policies" on which DiRussa relies are important, his argument misapprehends the scope of our power to vacate an award based on a violation of public policy. In *Newsday*, for instance, the arbitrators found that an employee described by the district court as a "chronic sexual harasser" had not been discharged for just cause and ordered his reinstatement. Newsday, 915 F.2d at 843-44. On appeal, we vacated the award because it ordered Newsday to retain the employee in violation of Title VII's strong prohibitions against sexual harassment in the workplace and "perpetuate[d] a hostile, intimidating and offensive work environment." Id. at 844-45. Other courts have vacated awards as against public policy to prevent conduct that is particularly harmful to society and egregious in nature, such as when the conduct required by the award would jeopardize public health and safety. E.g., Iowa Elec. Light & Power Co. v. Local Union, 204, 834 F.2d 1424, 1425, 1428 (8th Cir. 1987) (vacating award reinstating machinist in nuclear power plant discharged for "deliberately violating important federally-mandated safety regulations").

In contrast, DiRussa contends in effect that arbitration awards violate public policy whenever an arbitrator erroneously interprets federal statutory law. Whether to vacate an arbitration award based on this type of broadly-stated public policy poses a difficult question, and it is far from clear under the cases cited above where to draw the line in determining whether the public policy allegedly violated is important enough to require us to vacate an award. However innocent DiRussa's argument seems on its face, it could allow a court to vacate an

arbitration award any time it disagreed with the arbitrator's interpretation of federal statutory law. We doubt that the Supreme Court intended to invite this type of plenary review of arbitration awards when it held in *Gilmer* that statutory claims pursuant to the ADEA were arbitrable.

The key issue is actually not whether to expand the "public policy" ground for reversal of arbitration awards but whether a standard of review less deferential than "manifest disregard" may be appropriate when certain federal statutory rights are involved, as described in our discussion in II A above. For reasons there stated, we decline to address that question in this case. On this record, DiRussa has not shown that the award clearly violates public policy.

In sum, we find no ground on which to modify the arbitration award to include attorney's fees. We emphasize that we do not condone defendants' conduct here in demoting DiRussa, nor do we applaud an arbitration award that evinces some ignorance of the governing legal principles. However, we feel constrained by our precedents and policies regarding the limited scope of judicial review of arbitration awards to affirm the district court's order confirming the award.

C. Sealing of the File

DiRussa argues that the district court erred by placing the entire file, except for the court's opinions and orders, under seal. As noted above, defendants argued that a confidentiality agreement (the agreement) entered into by the parties during the discovery phase of the

arbitration required that the papers DiRussa submitted to the district court be placed under seal. The agreement provided, in relevant part, that

> All documents, information and all information contained in documents produced by the parties and obtained solely by virtue of their production by an opposing party in the course of this NASD arbitration (the 'produced materials or information') shall be used only for the purpose of this NASD arbitration or any proceeding in any court of competent jurisdiction in connection with this NASD arbitration . . .

The agreement also stated that produced materials or information could be disclosed to courts "as may be required in connection with this NASD arbitration, *provided* that such papers are filed under seal or partial seal, as necessary, to protect the confidentiality of the produced materials or information."

In its July 1995 opinion, the district court held that, as DiRussa argues, the agreement was "narrowly drawn" to protect only information " 'produced by the parties *and* obtained solely by virtue of their production by an opposing party in the course of' the NASD arbitration." (emphasis added). However, the court stated that it could not determine on the record before it whether the papers DiRussa had filed contained such information. Thus, to "safeguard such confidential material as may exist," the district court sealed the record and ordered the parties to attempt to agree as to which documents properly fell within the protection of the agreement. The court cautioned, however, that in the event the parties could not agree, defendants had the "burden of demonstrating on

appropriate papers that the disputed items f[ell] within the confidentiality agreement."

Ultimately, in its July 1996 opinion denying modification of the arbitration award, the district court held that the file would remain under seal with the exception of the court's orders and opinions in the case. 936 F.Supp. at 108. The district judge explained that he "agree[d] with defendants that it [was] not feasible to attempt a partial unsealing within the context of the parties' confidentiality agreement." Id.

The Supreme Court has explained that "the decision as to access [to judicial records] is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." Nixon v. Warner Comm., Inc., 435 U.S. 589, 599 (1978); cf. United States v. Amodeo, 71 F.3d 1044, 1053 (2d Cir. 1995) (holding that district court abused its discretion by unsealing record). We hold that the district court did not abuse its discretion in sealing the file pursuant to the confidentiality agreement.

Many cases have recognized that the public has a "common-law right of access" to judicial records. E.g., Nixon v. Warner Comm., Inc., 435 U.S. at 597-99; Video Software Dealers Assoc. v. Orion Pictures Corp. (In re Orion Pictures Corp.), 21 F.3d 24, 26 (2d Cir. 1994) (identifying "strong presumption of public access to court records"). The burden of demonstrating that a document submitted to a court should be sealed rests on the party seeking such action, in this case defendants. See Amodeo, 71 F.3d at 1047; compare In re "Agent Orange" Prod. Liab. Litigation, 821 F.2d 139, 145 (2d Cir. 1987) (under FRCP

26(c), party seeking protective order for discovery has the burden of showing good cause for issuance of the order).

Defendants argue that no presumption of access attached to any of the documents filed in the district court because "[d]ocuments that play no role in the performance of Article III functions, such as those passed between the parties in discovery, lie entirely beyond the presumption's reach, . . . and stand[ ] on a different footing than . . . any other document which is presented to the court to invoke its powers or affect its decisions." Amodeo, 71 F.3d at 1050 (internal quotes and citations omitted). Defendants maintain that most of the documents DiRussa submitted in the district court were at best "on the periphery of the adjudicatory process," see id. at 1051, allegedly because they were not relevant to the question whether the arbitration award could be modified to include attorney's fees. We need not reach this issue, however, because even assuming some presumption of access attached to these documents, we hold that the district court did not abuse its discretion in entering the final sealing order.

As DiRussa apparently concedes, the district court recognized the relevant legal principles by stating that "good cause must be shown for departing from [the] tradition" of allowing public inspection of case files, and explicitly placing on defendants the burden of showing that the documents fell within the agreement. Moreover, the district court interpreted that agreement "narrowly," presumably so that only documents in which the parties had a legitimate confidentiality interest would be sealed. DiRussa nevertheless argues that (1) defendants failed to sustain their burden of proving that the entire file should

remain under seal, and (2) the district court improperly failed to independently scrutinize the over-2000 page record in this case to determine the proper scope of the sealing order. We reject both contentions.

Defendants offered proof in the district court that DiRussa obtained certain documents solely from defendants and consequently that these documents and any references to information contained in them should be sealed pursuant to the agreement. In a letter to DiRussa dated July 20, defendants observed that at least six documents filed by DiRussa bore a stamp reflecting that DiRussa obtained them from defendants and insisted that DiRussa had indisputably obtained from them certain other documents, including an affidavit of Dean Witter's Senior Vice President and Associate General Counsel. In a brief in opposition to DiRussa's motion to modify the arbitration award, defendants alleged that "it is quite simply inconceivable" that DiRussa obtained certain other documents, including defendants' damage calculations, from any source other than from defendants during the arbitration. In that brief, defendants suggested that the district court direct DiRussa to state in an affidavit where he obtained documents filed with his complaint because it was "impossible for defendants to definitively state where plaintiff obtained" any of those documents. Finally, defendants argued that because DiRussa referred to documents protected by the agreement "repeatedly and regularly throughout each of the documents on file with the Court," partial sealing would be impractical.

DiRussa insists that "the trial court – not the parties themselves – should scrutinize every . . . [confidentiality] agreement involving the sealing of court papers and

what, if any, of them are to be sealed, and it is only after very careful, particularized review by the court that a Confidentiality Order may be executed." City of Hartford v. Chase, 942 F.2d 130, 136 (2d Cir. 1991); see In re Orion, 21 F.3d at 24. Although we agree that a district court must carefully evaluate requests to seal documents with a view towards the presumption of access to judicial records, we do not see how the district court could have independently determined without DiRussa's assistance (which has not been brought to our attention) where he obtained each document.

Finally, DiRussa raises a concern that the sealing order hinders exposure of the "acts of a violator of federal discrimination law to public scrutiny." However, the opinions of both this court and the district court, which are not under seal, discuss the facts underlying DiRussa's termination and clearly indicate that the arbitrators found that defendants discriminated against DiRussa based on age. Moreover, the arbitration award is available to the public on Westlaw. DiRussa v. Dean Witter Reynolds, Inc., No. 92-4232, 1995 WL 226601 (N.A.S.D., March 14, 1995). Under all the circumstances, we cannot say that the district court abused its discretion in sealing the file, except for the court's orders and opinions in this case.

We affirm the decision of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW WORK

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| RAYMOND J. DiRUSSA, Plaintiff, -against- DEAN WITTER REYNOLDS, INC., and LAWRENCE J. SOLARI, JR., Defendants. | 95 Civ. 4469 (CSH) MEMORANDUM AND ORDER |

*HAIGHT, Senior District Judge:*

These are cross-motions to vacate and confirm an award of arbitrators. The factual background appears in the Court's Memorandum and Order dated October 20, 1995, familiarity with which is presumed.

I

In their initial cross-motion, defendants moved to dismiss plaintiff's complaint, as well as confirm the award. The ground for the motion to dismiss was an asserted lack of subject matter jurisdiction in this Court. On the pleadings as they then existed, that question turned upon whether plaintiff's arbitrable claims sufficiently implicated the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. §§ 621 *et seq.* But I need not resolve that question, since plaintiff has amended his complaint to allege complete diversity

of citizenship. Defendants do not challenge plaintiff's jurisdictional allegations. It follows that whether or not subject matter jurisdiction exists under 28 U.S.C. § 1331, it clearly does under § 1332.

Plaintiff asks the Court to disregard as unauthorized written submissions by defendants that they characterize as "surreply." In point of fact, defendants made these submission as of right. Plaintiff moved to vacate or modify the award. Defendants then opposed that motion, and cross-moved to dismiss or confirm. Plaintiff then replied to defendants' opposition to his motion, and opposed defendants' cross-motion. Defendants then replied to plaintiff's opposition to their motion. This is all perfectly in order, and defendants' use of the term "surreply" does not change that fact. I have considered all of the submissions before me.

II

The first substantive point arises out of the arbitrators' refusal to award plaintiff his attorney's fees.

Plaintiff claimed that he had been wrongfully terminated by defendants on account of his age. His statement of claim before the National Association of Securities Dealers, Inc. ("NASD") alleged jurisdiction under the ADEA and the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1 *et seq.* Claim, ¶ 2. As plaintiff recognized in his statement of claim, the Supreme Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), required him to submit his discrimination claim to arbitration under the terms of his contract of employment. Plaintiff claimed, *inter alia*, "attorney's fees and

costs of suit pursuant to the ADEA and NJLAD." *Id.*, p. 6, ¶ (e).

The arbitrators, after conducting hearings and receiving briefs of counsel, rendered an award which gave plaintiff a total of $220,000 in compensatory damages but denied all other requested relief, including plaintiff's claim for attorney's fees.

Plaintiff asks the Court to vacate or modify the award in that respect, on the ground that the ADEA mandates an award of attorney's fees to a successful claimant.

Despite defendants' faint protests to the contrary, the factual predicate for plaintiff's contention is entirely accurate. Section 626(b) of the ADEA incorporates by reference that portion of the Fair Labor Standards Act providing that "[t]he court . . . *shall*, in addition to any judgment awarded to the plaintiff . . . , allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b) (emphasis added). The Second Circuit was repeatedly held that the ADEA mandates an award of fees to a plaintiff who recovers a judgment. *See, e.g., Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86 (2d Cir. 1983), citing *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 415 & n. 5 (1978).

Since the arbitrator's rejection of plaintiff's claim for attorney's fees under the ADEA does not fall within any of the limited grounds for vacating an arbitration award found in the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 10, 11, plaintiff must rely upon that judicially created ground for overturning arbitration awards known as "manifest disregard of the law." *See Carte Blanche*

*(Singapore) Pte. Ltd. v. Carte Blanche International, Ltd.*, 888 F.2d 260, 265 (2d Cir. 1989).[1]

The Second Circuit has cautioned that judicial inquiry into an arbitration award under the "manifest disregard" standard is "extremely limited." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 934 (2d Cir. 1986). The *Bobker* court continued: "The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it." *Id.*

Applying these principles to the case at bar, it is difficult to imagine a more "well defined, explicit and clearly applicable" provision of governing law than the ADEA's mandate that successful age discrimination claimants such as plaintiff recover attorney's fees. There is no "arguable difference" on the point, and consequently no basis for judicial reticence. In that regard, the case at bar is distinguishable from *Emrick v. Deutsche Bank Capital Corp.*, 1991 WL 61091 (S.D.N.Y.), upon which defendants rely. Judge Mukasey's discussion in *Emrick* demonstrates that the applicability of the state statute relied upon for attorney's fees was far from clear under the cases. *Id.* at *4.

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[1] In their main brief at 23, defendants refer to the doctrine in a caption as "magnificant disregard" of the law. Whatever Freudian explanation may account for that adjective, the discussion in the brief relates to manifest disregard.

But defendants at bar also rely upon other language in *Bobker*. To constitute manifest disregard of law, "[t]he error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it." 808 F.2d at 933.

These cautionary principles enhance and supplement those previously quoted. The Court of Appeals' conception of "disregard," a separate element (hence the word "moreover"), resonates with pejorative overtones, evoking the image of arbitrators thumbing their noses at a legal principle with which they are fully familiar.

I think that the application of these standards is fatal to plaintiff's case. I am not persuaded that the entitlement of an ADEA claimant to attorney's fees, which the statutory scheme provides by applying the FLSA to the ADEA, is "capable of being readily and instantly perceived" by the average NASD securities industry arbitrator. And the arbitrators at bar received no help from plaintiff's counsel, whose submissions on attorney's fees dealt only with the NJLAD. Plaintiff's counsel never argued to the arbitrators that an award of attorney's fees under the ADEA was mandatory. *Compare Carte Blanche*, 888 F.2d at 268 (claim that arbitrators disregarded governing law rejected where the authority relied upon "was apparently not cited to them in connection with [their] ruling.").

While plaintiff also based his claim for attorney's fees on the NJLAD, which counsel did discuss in his submissions, the manifest disregard claim fares no better. The NJLAD provides only that in such cases "the prevailing party *may* be awarded a reasonable attorney's fee as part of the costs," N.J. Stat. Ann. § 10:5-27 (emphasis added), which makes it less clear that the award was mandated in the case at bar. On this aspect of the case, it more closely resembles *Emric, supra.* Plaintiff argues in his briefs to this Court that under the New Jersey cases the award of attorney's fees is mandatory; but he never addressed that argument to the arbitrators, instead relying upon the New Jersey cases only to quantify the requested award.

I do think that the securities industry, having persuaded the Supreme Court in *Gilmer* to require arbitration of employees' ADEA claims, should be required to supply arbitrators who know what the ADEA says about attorney's fees. Whether, on the ADEA aspect of the case, the arbitrators committed a manifest disregard of law is a close question. However, applying the criteria which I conceive to be controlling in this circuit, I reject plaintiff's claim.

III

Plaintiff's second contention, that the award must be vacated or modified because the arbitrators did not properly calculate his damage, does not require extended discussion.

The FAA permits the District Court to modify or correct an award "[w]here there was an evident material miscalculation of the figures. . . . " 9 U.S.C. § 11(a). That is

not presented by the instant case, where the arbitrators did no more (and no less) than to disagree with plaintiff's damage calculations. Plaintiff calculated his discrimination damages claims, for back pay and front pay, in the millions.[2] Defendants, while denying any discrimination, calculated plaintiff's compensatory damages in the hundreds of thousands. The arbitrators clearly accepted defendants' contentions.

The arbitrators did not explain their damages calculations, but they did not need to. An arbitration panel "may render a lump sum award without disclosing their rationale for it, and . . . courts will not inquire into the basis of the award unless they believe that the arbitrators rendered it in 'manifest disregard' of the law or unless the facts of the case fail to support it." *Koch Oil, S.S. v. Transocean Gulf Oil Co.*, 751 F.2d 551, 554 (2d Cir. 1985). There is no substance to plaintiff's claim that defendants conceded at the hearings a damages amount greater than the arbitrators awarded. Defendants presented to the arbitrators two damages calculations of maximum back pay and front pay, using 1991 as the base year for one calculation and 1992 for the other. It is reasonable to infer from the award that the arbitrators accepted defendants' calculation of back pay and scaled back the calculation of maximum front pay. In discrimination cases, front pay is typically awarded in lieu of reinstatement where reinstatement is not feasible in the circumstances. *See Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir.

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[2] Plaintiff also claimed punitive damages, which the arbitrators denied.

1984). The arbitrators' award in the case at bar lay within their powers.

I have considered the other contentions made by plaintiff and find them to be without merit.

Plaintiff's motion to vacate or modify the award of the arbitrators is denied. Defendants' cross-motion to confirm the award is granted.

The file will remain under seal in accordance with the Court's prior orders, except that the Court's orders and opinions dated July 7, 1995, October 20, 1995, and this opinion will be placed in the public file. As to the documents generated by the arbitration and litigation, and the information they reference, I agree with defendants that it is not feasible to attempt a partial unsealing within the context of the parties' confidentiality agreement.

It is SO ORDERED.

Dated: New York, New York
July 24, 1996

/s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
UNITED STATES
SENIOR DISTRICT JUDGE

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

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In the Matter of the Arbitration
Between

**Name of Claimant** 92-04232

Raymond J. DiRussa

**Name of Respondents**

Dean Witter Reynolds Inc.
James F. Higgins
Robert J. Dwyer
Lawrence J. Solari, Jr.

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## REPRESENTATION

For Claimant: Mark F. Kluger, Esq. of Barry & McMoran, Newark, New Jersey.

For Respondents: Carol S. Bernheim, Esq. of Epstein Becker & Green, New York, New York.

## CASE INFORMATION

Statement of Claim filed: December 11, 1992.

Claimant's Submission Agreement signed on: November 18, 1992.

Joint Statement of Answer filed by Respondents Dean Witter Reynolds, Inc., James Higgins, Lawrence Solari and Robert Dwyer on: March 10, 1993.

Statement of Answer filed by Respondent Philip Purcell on: March 10, 1993.

Respondent Dean Witter Reynolds, Inc.'s Submission Agreement signed on: March 10, 1993.

Respondent Philip Purcell's Submission Agreement signed on: March 10, 1993.

Respondent James Higgin's Submission Agreement signed on: March 10, 1993.

Respondent Robert Dwyer's Submission Agreement signed on: March 10, 1993.

Respondent Lawrence Solari's Submission Agreement signed on: March 10, 1993.

## HEARING INFORMATION

Pre-Hearing Conference: December 14, 1994 / One Session

Hearing Dates / Sessions:
June 21, 1994 / Two Sessions.
July 18, 1994 / Two Sessions.
August 15, 1994 / Two Sessions.
September 22, 1994 / Two Sessions.
November 1, 1994 / Two Sessions.
November 7, 1994 / Two Sessions.
December 21, 1994 / Two Sessions.

Hearing Location: Offices of the National Association of Securities Dealers, Inc. located in New York City, New York.

## CASE SUMMARY

Claimant alleged that Respondents intentionally and wilfully discriminated against Claimant on the basis of age. Claimant further alleged that he took over the Ridgewood New Jersey Branch office for Respondent Dean Witter Reynolds, Inc. ("Dean Witter") in 1980 and that he performed his job in a competent and conscientious manner. Claimant next alleged that on May 8, 1992 he was informed by Respondent, Lawrence Solari ("Solari") that he would be removed from his position as manager of Dean Witter's Ridgewood, New Jersey office based upon the loss of three Account Executives from that office. Claimant alleged that he was informed by Respondent Solari that the decision came from Respondent Robert Dwyer ("Dwyer"), the National Director of Sales. Claimant further alleged that he was informed by Respondent Solari that the firm wanted Claimant to retire. Claimant alleged that when he refused to retire he was informed by Solari that Respondents wanted him out of the Ridgewood office as soon as possible and that he was then offered the position of Account Executive in either the Paramus or Morristown office. Claimant further alleged that he was refused such a position in the Wayne, New Jersey office, the same town in which he resided and that Claimant eventually accepted the position in the Morristown office. Claimant alleged that the three Account Executives that left the Ridgewood office did so because they were offered better compensation packages at another firm and the Respondents refused to give Claimant the authority to take steps to retain the three Account Executives. Additionally, Claimant alleged that younger managers had lost Account Executives who

were far better producers than the three that left Claimants office but were not removed from their positions. Claimant further alleged that Respondent James Higgins ("Higgins") had made statements that high-ranking employees of Respondent Dean Witter were asked to retire because of their ages and were offered incentive compensation to retire. Claimant alleged that at the time of his removal he was 58 years of age, two months from his 59th birthday and that he was replaced by an individual who was 44 years of age. Claimant alleged that Respondents intentionally, knowingly and wilfully discriminated against Claimant on the basis of his age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §620 *et seq.* Further, Claimant alleged that Respondents intentionally, knowingly, and wilfully discriminated against Claimant on the basis of his age in violation of the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1 *et seq.*

Respondents Dean Witter, Higgins, Dwyer and Solari maintained that in September 1980 Claimant was reassigned as Branch Manager of Respondent Dean Witter's Ridgewood, New Jersey office and that his official title was Senior Vice President Northeast Region. Respondents also maintained that Claimant remained in that position until early May 1992 when he was transferred by Respondents Solari and Dwyer to Respondent Dean Witter's Morristown, New Jersey office as Senior Vice President/ Account Executive due to his overall performance as head of the Ridgewood office. Respondents then maintained that as a Branch Manager, Claimant was responsible for the overall performance of the Ridgewood, New Jersey office and that Claimant was judged more by the

office's performance as compared to competitors within the same geographic area then by his personal performance. Respondents maintained that commencing in or around 1987 the performance of the Ridgewood, New Jersey office steadily declined. Respondents further maintained that, based upon information provided by the McLagan Partners Incorporated Private Investors Performance Monitor ("McLagan"), Respondent Dean Witter's share of total revenue in the Ridgewod area declined from 5.51% in 1987 to 4.65% in 1991; its branch rank dropped from 9 out of 12 to 11 out of 13; and its revenue per account executive dropped from 67.20% to 56.50%. Respondents also maintained that as a result of the declining performance, in mid-February, 1992, Respondent Solari, at Respondent Dwyer's request, asked Claimant to provide him with a report as to how Claimant intended to upgrade the staff of the Ridgewood office and return it to the levels of production attained in the mid to late 1980's. Respondents maintained that Claimant failed to provide an adequate response to Respondent Solari's request as the response was devoid of any specifics as to how Claimant was going to arrest the Ridgewood office's steady decline. Respondents further maintained that when the three Account Executives left the Ridgewood office, it was at a time when retaining Account Executives was a top priority for all Branch Managers. Respondents maintained that it was the departure of the three Account Executives, as well as Claimant's failure to provide a plan to rectify the inadequate performance, the Ridgewood office's inadequate performance, plus Claimant's inappropriate conduct with his

supervisors and subordinates, that contributed to Claimant's transfer to the position of Senior Vice President/ Account Executive. In addition, Respondents maintained that Claimant's age had nothing to do with his transfer, but rather was based solely on business related factors.

Respondents asserted the following defenses: (1) All actions taken by Respondents with respect to Claimant were nondiscriminatory, based upon sound business judgment, were neither arbitrary nor capricious, and were made in good faith and in compliance with the Age Discrimination in Employment Act of 1967 and the New Jersey Law Against Discrimination. (2) All actions taken by Respondents with respect to Claimant were for good cause, and based upon reasonable factors other than Claimant's age within the meaning of the ADEA and NJLAD. (3) If Respondents engaged in any of the unlawful acts alleged in Claimant's Statement of Claim it did not do so willfully, knowingly and/or intentionally. (4) Respondents' employment practices were proper, permissible and justified, and founded upon nondiscriminatory, legitimate business reasons. (5) Respondent Higgins was not a proper party to this proceeding due to his lack of direct involvement in Claimant's reassignment. (6) At all relevant times to this action, Respondents acted lawfully and in good faith and without intent to deny Claimant any rights under state or federal law and denies the allegations of unlawful conduct as alleged in the Statement of Claim and had reasonable grounds for believing the allegations in the Statement of Claim are nonviolative of any law. (7) Respondents' nondiscriminatory reasons for its actions regarding Claimant were not a pretext for

discrimination. (8) Respondents had no intent to discriminate against Claimant. (9) The arbitration panel is without authority to award liquidated and/or punitive damages in this proceeding. (10) Claimant is not entitled to an award of attorneys' fees or costs.

Respondent Philip J. Purcell ("Purcell") maintained that, apart from being named as a Respondent, he was not even mentioned in Claimant's Statement of Claim and that he had no connection with any of the matters set forth in Claimant's Statement of Claim. Respondent Purcell denied all material allegations made by Claimant insofar as they pertained to him. Respondent Purcell adopted with respect to himself all of the allegations, denials, and defenses set forth in the Statement of Answer submitted on behalf of Respondents Dean Witter, Higgins, Dwyer and Solari. Respondent Purcell also maintained that Claimant's Statement of Claim did not allege any conduct by Respondent Purcell nor any conduct that could give rise to any claim against him and that he was named as a Respondent in this matter solely for purposes of harassment. Respondent Purcell Moved to Dismiss.

## RELIEF REQUESTED

Claimant requested;

1. Reinstatement to the position of Branch Manager in the Ridgewood Office with back pay and interest and/or prospective lost wages and all employment benefits plus interest including but not limited to bonuses, pension, stock options and deferred compensation pursuant to the ADEA and NJLAD in the amount of $3 million.

2. Statutory liquidated damages plus interest pursuant to the ADEA in the amount of $3 million;

3. Compensatory damages for stress, humiliation, pain and suffering pursuant to the NJLAD in the amount of $1 million;

4. Punitive damages pursuant to the NJLAD in the amount of $10 million;

5. Attorneys fees and costs of suit pursuant to the ADEA and NJLAD; and

6. Such other relief as may be deemed equitable and just.

Respondents Dean Witter, Higgins, Solari and Dwyer requested:

1. Claimant's Statement of Claim be dismissed in its entirety,

2. Costs and reasonable attorneys' fees be assessed against Claimant.

Respondent Purcell requested:

1. Claimant's Statement of Claim be dismissed in its entirety,

2. Costs and reasonable attorneys' fees be assessed against Claimant.

## OTHER ISSUES CONSIDERED & DECIDED

Respondent Purcell filed a Motion to Dismiss Claimants Claim against him. The panel granted Respondent Purcell's Motion and dismissed Claimant's claim against Respondent Purcell.

## AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing and post hearing submissions, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. $200,000 joint and several against Respondents Dean Witter and Solari for compensatory damages, including lost wages and pain and suffering.

2. $20,000 compensatory award against Respondent Solari individually.

3. Claims against Robert Dwyer and James Higgins dismissed.

4. Claimants claims for punitive damages are denied.

5. Other relief requested denied.

6. The panel recommends that a copy of this award be placed in Respondent Solari's personnel file and that Respondent Dean Witter review with Solari appropriate conduct expected of management in these circumstances.

## FORUM FEES

Pursuant to Section 44c of the Code of Arbitration Procedure, the following Forum Fee(s) are assessed.

15 sessions X $1,500 = $22,500 minus hearing session deposit of $1,500 = net $1,600 due.

Forum fees Assessed Against:

1. Respondent Dean Witter is assessed the sum of $22,500 which represents the total forum fees due. Respondent Dean Witter is liable and shall pay to the NASD the sum of $22,500.

Fees are payable to the National Association of Securities Dealers, Inc.

Concurring Arbitrators' Signatures

Name — Industry Chairperson

/s/ Vicki Z. Holleman
Vicki Z. Holleman, Esq.

Name — Industry Panelist

/s/ Bill T. Singer
Bill T. Singer, Esq.

Name — Industry Panelist

/s/ Bernard B. Beal
Bernard B. Beal

Date of Decision: March 14, 1995

STATE OF: New York
ss:
COUNTY OF: Kings

On this 9th day of March, 1995, before me personally appeared Vicki Z. Holleman, Esq. known and known to me to be the individual described in and who executed

the foregoing instrument and he duly acknowledged to me that he executed the same.

/s/ George Koppel
GEORGE KOPPEL
Notary Public, State of New York
No. 24-4691583
Qualified in Kings County
Commission Expires January 31, 1996

STATE OF: N.Y.

ss:

COUNTY OF: N.Y.

On this 13 day of March, 1995, before me personally appeared Bill T. Singer, Esq. known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

/s/ Hugh Ross
HUGH ROSS
Notary Public, State of New York
No. 02R05021613
Qualified in New York County
Commission Expires Dec. 20, 1995

STATE OF: NEW YORK

ss:

COUNTY OF: NEW YORK

On this 14 day of March, 1995,before me personally appeared Bernard B. Beal known and known to me to be

the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

/s/ Andrew Russell
ANDREW RUSSELL
Notary Public, State of New York
No. 02RU5034752
Qualified in New York County
Commission Expires Oct. 17, 1996

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

X

RAYMOND J. DiRUSSA,

Plaintiff,

-against-

DEAN WITTER REYNOLDS, INC., and LAWRENCE J. SOLARI, JR.,

Defendants.

X

95 CIVIL 4469 (CSH)
JUDGMENT

#96.710

(Filed Jul. 31, 1996)

Plaintiff having moved to vacate or modify an award rendered by an arbitration panel of the National Association of securities Dealers, Inc., and Defendants having cross-moved to confirm the award, and the said motions having come before the Honorable Charles S. Haight, Jr., United States Senior District Judge, and the Court thereafter on July 24, 1996, having rendered its Memorandum and Order, denying Plaintiff's motion to vacate or modify and granting Defendants' motion to confirm the arbitration award, it is,

**ORDERED, ADJUDGED AND DECREED:** That for the reason set forth in the Court's Memorandum and Order of July 24, 1996, Plaintiff's motion to vacate or modify the arbitration award is denied and Defendant's motion to confirm the arbitration award is granted, accordingly, it is further,

**ORDERED, ADJUDGED AND DECREED,** that the arbitration award of the National Association of Securities Dealers, Inc. is hereby confirmed and judgment is

entered in favor of Plaintiff as against Defendants Dean Witter Reynolds, Inc. and Lawrence J. Solari, Jr., jointly and severally, in the sum of $200,000.00; and against Defendant Lawrence J. Solari, Jr., individually, in the sum of $20,000.00.

DATED: New York, New York
July 31, 1996

JAMES M. PARKISON
Clerk of Court
BY: /s/ John S. Hager
Deputy Clerk

BARRY & McMORAN
A Professional Corporation
One Newark Center
Newark, New Jersey 07102
(201) 624-6500
Attorneys for Plaintiff
(JJB-0246)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| RAYMOND J. DiRUSSA,<br>Plaintiff,<br>vs.<br>DEAN WITTER REYNOLDS, INC., and LAWRENCE J. SOLARI, JR.,<br>Defendants. | Civil Action No. 95 Civ. 4469 (CSH)<br>Civil Action<br>**AMENDED COMPLAINT** |

Raymond J. DiRussa, of 74 Coventry Road, Wayne, New Jersey, by way of complaint against the defendants, says:

## THE PARTIES

1. Plaintiff, Raymond J. DiRussa ("DiRussa"), with a residence at 74 Coventry Road, Wayne, New Jersey, is a citizen of the State of New Jersey.

2. Defendant Dean Witter Reynolds, Inc. ("Dean Witter") is a corporation of the State of Delaware with a

principal place of business at 2 World Trade Center in the City of New York and the State of New York. Dean Witter employed DiRussa as Branch Manager of its Ridgewood, New Jersey office from 1980 to May, 1992.

3. Defendant Lawrence J. Solari, Jr. ("Solari") is a citizen of the State of California. During all pertinent times herein, Solari was employed by Dean Witter as the Regional Director of Region 7 of Dean Witter and maintained his office at 2 World Trade Center in the City of New York in the State of New York.

## JURISDICTION

4. The matter in controversy between the parties exceeds the sum or value of $50,000.00 and is between citizens of different states.

5. The controversy between the parties arises out of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*

6. This Court has jurisdiction over the claims asserted in this Complaint pursuant to 28 U.S.C. §§1331, 1332 and 1367.

7. Venue is proper in this district pursuant to 9 U.S.C. §9 and 28 U.S.C. §1391(b).

## FACTUAL ALLEGATIONS

8. Plaintiff commenced working for Dean Witter in 1950 at the age of 17.

9. By 1978, he had worked his way up within the company to the position of Regional Manager.

10. In 1980, during a consolidation of regions, plaintiff became Branch Manager at Dean Witter's Ridgewood, New Jersey branch.

11. The Ridgewood branch always performed exceptionally well under plaintiff's leadership.

12. Plaintiff regularly met his challenge goals and received salary increases and bonuses throughout his years in the Ridgewood branch. plaintiff's compliance record was almost perfect. He was never told that either he or the branch was performing poorly.

13. In 1990, Solari became a Regional Manager for Dean Witter. At all relevant times herein, Solari, as well as Purcell, Higgins and Dwyer had supervisory responsibilities over plaintiff.

14. In 1992, Solari targeted plaintiff for termination because of his age. He asked the Human Resources Department at Dean Witter to develop a retirement package.

15. When it became evident that a retirement package would not be enough to induce plaintiff to leave, Solari, Dwyer and others began a campaign to terminate plaintiff.

16. Solari executed the campaign with the assistance of other Dean Witter employees. At Solari's direction, a back-dated phony memorandum was created; a copy of the memoranda was placed into plaintiff's personnel file but never delivered to him; and the original memoranda was ordered destroyed.

17. Solari and the others also seized upon the departure of three account executives of the Ridgewood, New Jersey branch as an excuse to fire plaintiff.

18. On May 8, 1992, Solari fired plaintiff from his position as Branch Manager because of his age. In May, 1992, the Ridgewood Branch was ranked number 2 out of 40 branches in profitability in the Region.

19. As a result of defendants' actions and age discrimination, plaintiff was humiliated and suffered from great stress and sustained damages including, but not limited to, lost wages, back pay, front pay and employment benefits, such as bonuses, pension, stock options and deferred compensation.

20. Plaintiff filed a Statement Claim with the National Association of Securities Dealers, Inc. ("NASD") on December 11, 1992 under the Age Discrimination Employment Act of 1967 ("ADEA"), 29 U.S.C. §620, *et seq.* and the New Jersey Law Against Discrimination *N.J.S.A.* 10:5-1 *et seq.* ("NJLAD"). The claim named as defendants, Dean Witter and Solari, and others. Plaintiff sought relief in the form of: (a) reinstatement to the position of Branch Manager with back pay and interest and/or prospective lost wages and all employment benefits plus interest including but not limited to bonuses, pension, stock options and deferred compensation pursuant to the ADEA and NJLAD in the amount of $3 million; (b) statutory liquidated damages plus interest pursuant to the ADEA in the amount of $3 million; (c) compensatory damages for stress, humiliation, pain and suffering pursuant to the NJLAD in the amount of $10 million; (d) punitive damages pursuant to the NJLAD in the amount

of $10 million; (e) attorneys fees and costs of suit pursuant to the ADEA and the NJLAD; and (f) such other relief as may be deemed equitable and just.

21. A Statement of Answer was filed by defendants on March 10, 1993. NASD Submission Agreements were filed by all parties.

22. An arbitration panel of the NASD ("the Panel") conducted hearing sessions on June 21, July 18, August 15, September 22, November 1, November 7 and December 21, 1994 at the New York, New York offices of NASD.

23. During the hearing, plaintiff submitted extensive, competent evidence establishing the damages sustained by him. Such evidence established that plaintiff has suffered lost wages in the amount of $2,387,313.

24. Defendants did not challenge plaintiff's damages during the presentation of plaintiff's case or their own case. Defendants introduced no evidence on damages until after the close of their case.

25. After the close of their case, defendants submitted an eleven (11) page document to the Panel purporting to set forth damages calculations. Defendants did not lay any foundation for the introduction of such evidence.

26. Plaintiff did not have the opportunity to cross-examine any of defendants' witnesses on the calculations. plaintiff was not given an opportunity to offer rebuttal witnesses in response to defendants' damages calculations.

27. Over the objection of plaintiff, defendants' damages calculations were accepted into evidence by the Panel.

28. After the hearing, the panel determined that Dean Witter and Solari had discriminated against plaintiff on the basis of his age. In its March 14, 1995 Award, the Panel awarded plaintiff:

> $200,000 joint and several against Respondents Dean Witter and Solari for compensatory damages, including lost wages and pain and suffering,
>
> and
>
> $20,000 compensatory award against Respondent Solari individually.

29. The Panel denied all other relief requested by plaintiff, including his request for attorneys fees.

## COUNT ONE

30. The allegations of paragraphs 1 through 29 are repeated as if set forth in their entirety.

31. Plaintiff is entitled to all statutory rights and remedies accorded under the ADEA.

32. Pursuant to the express terms of the ADEA, an award of attorneys' fees to a prevailing plaintiff is mandatory. Section 626(b) of the ADEA incorporates by reference § 216(b) of the Fair Labor Standards Act, which provides:

> The Court . . . **shall** in addition to any judgment awarded to the plaintiff . . . allow a reasonable attorneys fee to be paid by the defendant, and costs of the action. [Emphasis added.]

33. Plaintiff is a prevailing plaintiff.

34. Plaintiff should have been awarded attorneys' fees. The Panel acted in manifest disregard of the law in failing to award such fees.

35. Plaintiff incurred reasonable counsel fees of $249,010.50 in prosecuting his age discrimination claims against defendants.

36. The Arbitration Award should be modified to award plaintiff counsel fees in the amount of $249,010.50.

## COUNT TWO

37. The allegations of paragraphs 1 through 36 are repeated as if set forth in their entirely [sic].

38. Plaintiff is entitled to all statutory rights and remedies accorded under the NJLAD.

39. Pursuant to Section 27.1 of the NJLAD, an award of attorneys' fees to a prevailing plaintiff is mandatory.

40. Plaintiff is a prevailing plaintiff.

41. Plaintiff should have been awarded attorneys' fees. The Panel acted in manifest disregard of the law in failing to reward such fees.

42. Plaintiff incurred reasonable counsel fees of $249,010.50 in prosecuting his age discrimination claim against defendants.

43. The arbitration award should be modified to award plaintiff counsel fees in the amount of $249,010.50.

## COUNT THREE

44. The allegations of paragraphs 1 through 43 are repeated as if set forth in their entirety.

45. In calculating its damage award, the Panel made an evident miscalculation of damages.

46. Plaintiff's damages calculations establish that plaintiff sustained damages of $2,387,313 for lost wages alone.

47. According to defendants' damages calculations, defendants conceded that plaintiff sustained lost wages of at least $371,087.

48. The calculation of lost wages alone should have been at least $371,087.

49. The Panel improperly calculated damages in awarding $200,000 for lost wages damages, and pain and suffering.

50. The correct calculation of lost wages damages is $2,387,313.

51. The panel's damage award should be modified to increase damages to $2,387,313 plus an amount for pain and suffering and the 520,000 compensatory award against Solari individually.

## COUNT FOUR

52. The allegations of paragraphs 1 through 51 are repeated as if set forth in their entirety.

53. The panel failed to award an amount of damages conceded by both parties to be due.

54. Both plaintiff and defendants conceded that at least $371,087 in lost wages alone were sustained by plaintiff.

55. In the alternative, the Panel's award should be modified to increase plaintiff's damages to at least $371.087 plus an amount for pain and suffering and the $20,000 compensatory award against Solari individually.

## COUNT FIVE

56. The allegations of Paragraphs 1 through 55 are repeated as if set forth in their entirety.

57. The panel improperly admitted defendants' damages calculations into evidence.

58. The Panel engaged in misconduct by refusing to allow plaintiff to cross-examine on the calculations and offer rebuttal evidence.

59. In the alternative, the arbitration award should be vacated in part. The damage award should be vacated and the matter should be remanded to the arbitration panel for a proper determination of damages.

WHEREFORE, plaintiff, Raymond J. DiRussa, demands judgment:

(a) Confirming the liability determination of the arbitration award that defendants, Dean Witter Reynolds, Inc. and Lawrence J. Solari, Jr. discriminated against plaintiff because of his age;

(b) Modifying the arbitration award to include an award of counsel fees to plaintiff in the amount of $249,010.50;

(c) Modifying the arbitration award to increase the amount of damages awarded to plaintiff to $2,387,313 or, in the alternative, to $371,087, plus an amount for pain and suffering and the $20,000 awarded against Solari, individually;

(d) Alternatively, vacating the damage award of the arbitration award and remanding to the Panel for a proper determination of the damages issues; and

(e) Granting such other relief as the Court may deem equitable and just.

BARRY & McMORAN
Attorneys for plaintiff
Raymond J. DiRussa

By: John J. Barry
John J. Barry

Dated: October 25, 1995

NATIONAL ASSOCIATION
OF SECURITIES DEALERS, INC.

IN THE MATTER OF THE
ARBITRATION BETWEEN:

| | | |
|---|---|---|
| RAYMOND J. DiRUSSA, | : | Arbitration No. |
| Claimant, | : | |
| | : | **STATEMENT** |
| v. | : | **OF CLAIM** |
| DEAN WITTER REYNOLDS, INC., PHILIP PURCELL, JAMES HIGGINS, ROBERT DWYER AND LAURENCE SOLARI, | : | |
| Respondents. | : | |

## NATURE OF THE CASE

1. This is an action brought by claimant, Raymond J. DiRussa an employee of Dean Witter Reynolds, Incorporated against defendants for intentional and willful discrimination on the basis of age.

## JURISDICTION

2. Jurisdiction over this action is conferred by the Age Discrimination in Employment Act of 1967 (hereinafter "ADEA") as amended 29 U.S.C. § 626(b) and 626(c) and the New Jersey Law Against Discrimination (hereinafter "NJLAD"), N.J.S.A. 10:5-1 *et seq.*. Claimant is filing for arbitration as required by the decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647 (1991).

## PARTIES

3. Claimant, Raymond J. DiRussa, is a citizen and resident in the State of New Jersey residing at 74 Coventry Road, in the town of Wayne and state of New Jersey.

4. Respondent, Dean Witter Reynolds, Incorporated maintains its principal place of business at 2 World Trade Center in the City of New York and State of New York.

5. Respondent Philip Purcell is the Chairman of Dean Witter Reynolds, Inc. and maintains his office at 2 World Trade Center in the City of New York and State of New York.

6. Respondent James Higgins is the President of Dean Witter Reynolds, Inc. and maintains his office at 2 World Trade Center in the City of New York and State of New York.

7. Respondent Robert Dwyer is the National Sales Director of Dean Witter Reynolds, Inc. and maintains his office at 2 World Trade Center in the City of New York and State of New York.

8. Respondent Laurence Solari is the Regional Director of Region 7 of Dean Witter Reynolds, Inc. and maintains his office at 2 World Trade Center in the City of New York and State of New York.

## FIRST COUNT

9. Claimant became employed by respondent firm on or about October 24, 1950 as a messenger.

**10.** During the course of his employment with respondent firm, claimant developed substantial knowledge and expertise in the area of his employment. Plaintiff has worked in all phases of respondent firm's operations and has held numerous positions including Account Executive, Assistant Branch Manager, Branch Compliance Director, Branch Manager, Assistant Regional Manager and Regional Manager. Claimant assisted in the development of a national recruiting policy. Claimant taught in the training department and was recognized by respondent for his teaching skills. He was a member of the operations, sales and compliance team which set policy for the firm. Claimant was instrumental in creating new forms to comply with NYSE rules. He has served on the firm's error committee. Claimant has served as an expert witness on behalf of the firm. Claimant is a member of the NYSE Supervisory and Disciplinary Panel.

**11.** Claimant took over the firm's Ridgewood, New Jersey office in 1980 and built it from approximately 6 account executives to over 30 account executives. In addition, as manager of the Ridgewood office, he opened and built a satellite office in Toms River, New Jersey. He built the Toms River operation to approximately 15 account executives. Internal audits for 1988, 1989, 1990 and 1991 have rated the Ridgewood office as exceptionally high. The Ridgewood office has ranked well both in the region and nationally in regard to percentage of net to gross and net hard dollars up to and including the first quarter of 1992.

**12.** Claimant performed his job in a competent and conscientious manner.

**13.** On May 8, 1992, claimant was informed by respondent Laurence Solari, the Regional Director, that he would be removed from his position as Manager of the defendant's Ridgewood, New Jersey office. Solari told plaintiff that the decision came from respondent Robert Dwyer, the National Director of Sales. Claimant was told by Solari that the reason for his removal was the fact that his office had recently lost three Account Executives. Solari told claimant that the firm wanted him to retire. Claimant refused to retire and was told by Solari that respondent wanted him out of the Ridgewood office as soon as possible. Claimant was then offered the position of Account Executive in either the Paramus or Morristown office. He was refused such a position in the Wayne, New Jersey office, in the same town in which he resides. Claimant eventually accepted the position of Account Executive in the Morristown office.

**14.** The three Account Executives in question left Dean Witter because they were offered better compensation packages at another firm. Respondents refused to give claimant the monetary authority to take steps to retain the three Account Executives.

**15.** Younger managers had lost Account Executives who were far better producers than the three in question but were not removed from their positions.

**16.** Respondent James Higgins has made statements that high-ranking employees of Dean Witter were asked to retire because of their ages and were offered incentive compensation to retire.

**17.** Claimant's date of birth is July 29, 1933. At the time that he was informed of his removal, claimant was 58 years of age, two months prior to his 59th birthday.

**18.** Claimant was replaced by James Gunther, an individual who is substantially younger (approximately age 44) than plaintiff.

**19.** Respondents intentionally, knowingly and wilfully discriminated against plaintiff on the basis of his age in violation of 29 U.S.C. § 620 *et seq*.

**20.** As a result of the wrongful acts of respondents, claimant has sustained losses of earnings and other employment benefits.

SECOND COUNT

**21.** Claimant incorporates for reference each and every allegation made previously herein.

**22.** Respondents intentionally, knowingly and wilfully discriminated against plaintiff on the basis of his age in violation of N.J.S.A. 10:5-1 *et seq*.

23. As a result of the wrongful acts of respondents, Claimant has sustained losses of earnings and other employment benefits and has suffered and will continue to suffer stress, humiliation, pain and suffering.

**WHEREFORE**, plaintiff demands judgment against respondents and seeks the following relief:

a) Reinstatement to the position of Branch Manager in the Ridgewood office with back pay and interest and/or prospective lost wages and all employment benefits plus interest including but

not limited to bonuses, pension, stock options and deferred compensation pursuant to the ADEA and NJLAD in the amount of $3 million;

b) Statutory liquidated damages plus interest pursuant to the ADEA in the amount of $3 million;

c) Compensatory damages for stress, humiliation, pain and suffering pursuant to the NJLAD in the amount of $1 million;

d) Punitive damages pursuant to the NJLAD in the amount of $10 million;

e) Attorneys fees and costs of suit pursuant to the ADEA and NJLAD; and

f) Such other relief as may be deemed equitable and just.

SMITH, MULLIN & KIERNAN, P.C.
200 Executive Drive, Suite 155
West Orange, New Jersey 07052
(201) 736-7033
Attorneys for Claimant

BY: /s/ Kevin Kiernan
KEVIN KIERNAN, Esq.

DATED: December 11, 1992

---

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) provides as follows:

> It shall be unlawful for an employer –
>
> **(1)** to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> **(2)** to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> **(3)** to reduce the wage rate of any employee in order to comply with this chapter.
>
> * * *

The Age Discrimination in Employment Act, 29 U.S.C. § 626(b) provides as follows:

> The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of

willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

The Age Discrimination in Employment Act, 29 U.S.C. § 626(c) provides as follows:

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

* * *

Section 1 of the Federal Arbitration Act, 9 U.S.C. § 1 provides as follows:

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

July 30, 1947, c. 392, 61 Stat. 670.

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2 provides as follows:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising

out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

The New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-3, provides as follows:

The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, *familial status*, liability for service in the Armed Forces of the United States, or nationality, are *matters* of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State; provided, however, that nothing in this expression of policy prevents the making of legitimate distinctions between citizens and aliens when required by federal law or otherwise necessary to promote the national interest.

The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of the race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, liability for service in the Armed Forces of the United States, or nationality of that person or that person's spouse, partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers,

in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured.

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

Amended by L.1992, c. 146, § 1, eff. Nov. 20, 1992.

* * *

The New Jersey Law Against Discrimination, N.J. Stat. Ann. 10:5-12(a), provides as follows:

It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

a. For an employer, because of the race, creed, color, national origin, ancestry, age, marital status, affectional

or sexual orientation, *genetic information*, sex or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, *or because of the refusal to submit to a genetic test or make available the results of a genetic test to any employer*, to refuse to hire or employ or to bar or to discharge or require to retire, unless justified by lawful considerations other than age, from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment; provided, however, it shall not be an unlawful employment practice to refuse to accept for employment an applicant who has received a notice of induction or orders to report for active duty in the armed forces; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment any person on the basis of sex in those certain circumstances where sex is a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business or enterprise; provided further that nothing herein contained shall be construed to bar an employer from refusing to accept for employment or to promote any person over 70 years of age; provided further that it shall not be an unlawful employment practice for a club exclusively social or fraternal to use club membership as a uniform qualification for employment, or for a religious association or organization to utilize religious affiliation as a uniform qualification in the employment of clergy, religious teachers or other employees engaged in the religious activities of the association or organization, or in following the tenents of its religion in establishing and

utilizing criteria for employment of an employee; provided further, that it shall not be an unlawful employment practice to require the retirement of any employee who, for the two-year period immediately before retirement, is employed in a bona fide executive or a high policy-making position, if that employee is entitled to an immediate non-forfeitable annual retirement benefit from a pension, profit sharing, savings or deferred retirement plan, or any combination of those plans, of the employer of that employee which equals in the aggregate at least $27,000.00; and provided further that an employer may restrict employment to citizens of the United States where such restriction is required by federal law or is otherwise necessary to protect the national interest.

For the purposes of this subsection, a "bona fide executive" is a top level employee who exercises substantial executive authority over a significant number of employees and a large volume of business. A "high policy-making position" is a position in which a person plays a significant role in developing policy and in recommending the implementation thereof.

* * *

The New Jersey Law Against Discrimination N.J. Stat. Ann. 10:5-13, provides as follows:

Any person claiming to be aggrieved by an unlawful employment practice or an unlawful discrimination may, personally or by an attorney-at-law, make, sign and file with the division a verified complaint in writing which shall state the name and address of the person, employer, labor organization, employment agency, owner, lessee,

proprietor, manager, superintendent, or agent alleged to have committed the unlawful employment practice or unlawful discrimination complained of and which shall set forth the particulars thereof and shall contain such other information as may be required by the division. Upon receipt of the complaint, the division shall notify the complainant on a form promulgated by the director of the division and approved by the Attorney General of the complainant's rights under this act, including the right to file a complaint in the Superior Court to be heard before a jury; of the jurisdictional limitations of the division; and any other provisions of this act, without interpretation, that may apply to the complaint. The Commissioner of Labor, the Attorney General, or the Commissioner of Education may, in like manner, make, sign and file such complaint. Any employer whose employees, or some of them, refuse or threaten to refuse to co-operate with the provisions of this act, may file with the division a verified complaint asking for assistance by conciliation or other remedial action.

Any complainant may initiate suit in Superior Court under this act without first filing a complaint with the division or any municipal office. Upon the application of any party, a jury trial shall be directed to try the validity of any claim under this act specified in the suit. All remedies available in common law tort actions shall be available to prevailing plaintiffs. These remedies are in addition to any provided by this act or any other statute. Prosecution of such suit in Superior Court under this act shall bar the filing of a complaint with the division or any municipal office during the pendency of any such suit.

At any time after 180 days from the filing of a complaint with the division, a complainant may file a request with the division to present the action personally or through counsel to the Office of Administrative Law. Upon such request, the director of the division shall file the action with the Office of Administrative Law, provided that no action may be filed with the Office of Administrative Law where the director of the division has found that no probable cause exists to credit the allegations of the complaint or has otherwise dismissed the complaint.

A party to an action based upon a violation of this act shall mail a copy of the initial pleadings or claims, amended pleadings or claims, counterclaims, briefs, and legal memoranda to the division at the same time as filing such documents with the Office of Administrative Law or the court. Upon application to the Office of Administrative Law or to the court wherein the matter is pending, the division shall be permitted to intervene.

* * *

The New Jersey Law Against Discrimination N.J. Stat. Ann. 10:5-27.1, provides as follows:

In any action or proceeding brought under this act, the prevailing party may be awarded a reasonable attorney's fee as part of the cost, provided however, that no attorney's fee shall be awarded to the respondent unless there is a determination that the charge was brought in bad faith.

Section 9 of the National Association of Securities Dealers, Inc., Code of Arbitration Procedure July 1995 provides:

* * *

**Sec. 9.** (a) In disputes subject to arbitration that arise out of the employment or termination of employment of an associated person, and that relate exclusively to disputes involving employment contracts, promissory notes or receipt of commissions, the panel of arbitrators shall be appointed as provided by Sections 9(b)(i), (b)(ii) or 10 of the Code, whichever is applicable. In all other disputes arising out of the employment or termination of employment of an associated person, the panel of arbitrators shall be appointed as provided by Sections 13 or 19 of the Code, whichever is applicable.

(b)(i) Except as otherwise provided in Section 9(a) or 10 of the Code, in all arbitration matters between or among members and/or persons associated with members, and where the amount in controversy does not exceed $30,000, the Director of Arbitration shall appoint a single arbitrator to decide the matter in controversy. The arbitrator chosen shall be from the securities industry. Upon the request of a party in its initial filing or the arbitrator, the Director of Arbitration shall appoint a panel of three (3) arbitrators, all of whom shall be from the securities industry.

(ii) Except as otherwise provided in Section 9(a), in all arbitration matters between or among members and/or persons associated with members and where the amount in controversy exceeds $30,000, a panel shall consist of three arbitrators, all of whom shall be from the securities industry.

*[Amended effective May 10, 1989; amended effective October 1, 1993.]*

* * *

Section 46(c)(1) of the National Association of Securities Dealers, Inc., Code of Arbritration Procedure July 1995 provides:

* * *

*Appointment of Arbitrators*

(c)(1) Eligible matters shall be heard and determined by a panel of three arbitrators, at least one of which shall be an attorney; provided, however, that the parties may agree to submit an eligible matter to a single mutually acceptable arbitrator selected pursuant to the provisions of this subsection (c).

* * *

(2)

FILED
DEC 5 1997
CLERK

No. 97-773

In The

# Supreme Court of the United States

October Term, 1997

RAYMOND J. DiRUSSA,

*Petitioner,*

*vs.*

DEAN WITTER REYNOLDS, INC. and LAWRENCE J. SOLARI, JR.,

*Respondents.*

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## RESPONDENTS' BRIEF IN OPPOSITION

RONALD M. GREEN
*Counsel of Record*
EPSTEIN BECKER & GREEN, P.C.
*Attorneys for Respondents*
250 Park Avenue
New York, New York 10177-0077
(212) 351-4646

72601 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

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## COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Should this Court exercise its discretionary jurisdiction to determine whether arbitral awards arising out of employment discrimination claims should be subject to a standard of review by the courts more rigorous than the manifest disregard of the law standard where: (a) Petitioner failed to properly preserve this argument below; (b) the Second Circuit did not pass upon this issue; (c) there is nothing in any decision of this Court indicating a different standard should apply to arbitrated employment discrimination claims as opposed to other arbitrated statutory or non-statutory claims; and (d) it was not the "rigorous" standard of review imposed by the manifest disregard of the law standard which denied Petitioner his attorneys' fees but rather his own failure to properly request them in the first instance at arbitration?

2. Should this Court exercise its discretionary jurisdiction to hear the issue of whether the arbitrators' refusal to award Petitioner attorneys' fees violates public policy where: (a) Petitioner failed to properly preserve this argument below; and (b) this argument is: (i) a reformulation of his earlier argument and suffers from the same defects; (ii) nothing more than Petitioner's assertion that the Second Circuit misapplied a properly stated rule of law to the facts?

## STATEMENT PURSUANT TO RULE 29.6

The parent company of Dean Witter Reynolds Inc. is Morgan Stanley, Dean Witter, Discover & Co. Dean Witter Reynolds Inc. has no nonwholly owned subsidiaries.

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**APPENDIX**

Appendix A — Correspondence Between the Parties ... 1a

Respondents Dean Witter Reynolds Inc. and Lawrence J. Solari, Jr., (collectively referred to as "Dean Witter" or "Respondents") request that the Court deny the petition for a writ of certiorari filed by Raymond J. DiRussa ("DiRussa" or "Petitioner") to review the decision of the United States Court of Appeals for the Second Circuit affirming the judgment of the United States District Court, Southern District of New York which: (1) denied DiRussa's motion to vacate and/or modify an arbitration award rendered by a Panel of Arbitrators ("Panel") of the National Association of Securities Dealers, Inc. ("NASD"); (2) granted Dean Witter's cross-motion to confirm the arbitration award; and (3) ruled that the *entire* file of proceedings before the district court should remain under seal, except for the district court's July 7, 1995, October 20, 1995 and July 24, 1996 orders and opinions that were placed in the district court's public file.

## COUNTERSTATEMENT OF THE CASE

On December 11, 1992 DiRussa filed a Statement of Claim with the NASD.[1] He alleged that his removal from his position as Branch Manager of Dean Witter's Ridgewood, New Jersey

1. DiRussa asserts in his Petition that

> [w]hen the EEOC [Equal Employment Opportunity Commission] declined to pursue DiRussa's claim, he submitted it to an arbitration panel of the National Association of Securities Dealers. . . .

(Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit dated November 3, 1997 ("Pet.") at p. 3.) Petitioner is inexact. First, his Statement of Claim was submitted to the NASD approximately one month *before* he filed a Charge of Discrimination with the EEOC. Second, the EEOC did not decline to pursue his claim but rather *dismissed* it after investigation, finding no probable cause to believe that DiRussa had been discriminated against.

branch violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), and the New Jersey Law Against Discrimination, N.J. Stat. Ann. §§ 10:5-27.1 *et seq.* ("NJLAD"). Plaintiff sought: reinstatement to his position and/or prospective lost wages and benefits; liquidated, punitive and compensatory damages; and attorneys' fees and costs. By opinion and award dated March 14, 1995, the Panel awarded DiRussa a fraction of the over $17,000,000 he sought from Dean Witter — a total of $220,000 for all damages claimed. The Panel denied all other requested relief. (*See* pp. 31-42 of the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit dated November 3, 1997 ("Pet. App.").)

During the course of the arbitration, the parties entered into a Confidentiality Agreement (the "Agreement"), which governed documents and information produced by the parties. The Agreement specifically provides that:

> [a]ll documents, information and all information contained in documents produced by the parties and obtained solely by virtue of their production by an opposing party in the course of this NASD arbitration (the "produced materials or information") shall be used only for the purpose of this NASD arbitration or any proceeding in any court of competent jurisdiction in connection with this NASD arbitration . . .

(Pet. App. at 18). The Agreement further provides that produced materials or information may not be disclosed, shown, or otherwise revealed or made available to anyone, directly or indirectly, other than:

> (e) courts, court reporters and employees, as may be

> required in connection with this NASD arbitration, *provided that such papers are filed under seal or partial seal, as necessary, to protect the confidentiality of the produced materials or information.*

(Pet. App. at 18) (emphasis added).

On June 14, 1995, DiRussa filed a Complaint and a motion with the United States District Court, Southern District of New York in which he sought, among other things, modification of the arbitration award to add and include an award of attorneys' fees, because the Panel acted in manifest disregard of the law in failing to award such fees.[2] Dean Witter opposed DiRussa's motion and cross-moved to confirm the arbitration award.

Upon learning that the documents filed by plaintiff with the district court had *not* been filed under seal as mandated by the Agreement, defendants requested that DiRussa take the steps necessary to comply with the parties' Agreement. He refused.

By Order dated July 7, 1995, the district court, at Dean Witter's request, directed the Clerk of the Court to place the *entire* file under seal pending further order. (Pet. App. at 18-19.) By Memorandum and Order dated July 24, 1996, the district court: (a) denied DiRussa's motion in its entirety; (b) granted Dean Witter's cross-motion to confirm the arbitration award; and (c) reaffirmed its July 7, 1995 Order sealing the file, except for its three decisions. (Pet. App. at 30.)

---

2. On or about October 25, 1995 plaintiff filed an Amended Complaint with the district court to cure his defective jurisdictional allegations. His challenge to the Panel's failure to award him attorneys' fees in his Amended Complaint is identical to his initial Complaint, and again was based solely on the Panel's purported "manifest disregard of law" and no other basis.

By Notice of Appeal dated August 20, 1996, DiRussa appealed to the United States Court of Appeals for the Second Circuit. In furtherance of his appeal, DiRussa filed various documents with the Second Circuit which were part of the file sealed by the district court. Then in blatant disregard of the district court Orders, DiRussa once did not, and again refused to, take the steps necessary to seal the file now before the Second Circuit pending his appeal. Thus, Dean Witter sought relief. By Order dated October 28, 1996 the Second Circuit "granted defendants' motion to seal all documents submitted in this court that were also subject to the district court's sealing order." (Pet. App. at 5.)

On August 5, 1997 the United States Court of Appeals for the Second Circuit affirmed the decision of the district court in its entirety. (Pet. App. at 1-22.) The court held that: (a) "we find no ground on which to modify the arbitration award to include attorney's fees"; and (b) "[u]nder all the circumstances, we cannot say that the district court abused its discretion in sealing the file, except for the court's orders and opinions in this case." (Pet. App. at 17, 22.)

Petitioner seeks the Court's review on a writ of certiorari on the first of these issues.

## REASONS FOR DENYING THE WRIT

Although Petitioner ostensibly asserts that the writ should be granted because the Second Circuit: (a) "decided an important question of federal law that has not been, but should be, settled by the Court," and (b) "decided an important federal question in a way that conflicts with relevant decisions of this Court," it in fact did no such thing. (Pet. at 6-12, 12-18.) Petitioner has stated no compelling reason why a writ of certiorari should be granted.

First, Petitioner makes the identical legal arguments which he raised for the *first* time on appeal and which the Second Circuit ruled he had waived by failing to present to the district court. The Court should not review issues that Petitioner failed to preserve below properly and that the Second Circuit per force did not pass upon.

Second, the Court has already established a standard of review sufficiently rigorous for arbitral awards arising from employment discrimination actions — the manifest-disregard-of-the-law standard. Indeed, it was not the rigors of that standard which resulted in Petitioner not being awarded attorneys' fees but, rather, his own failure to request them properly in the first instance.

Third, there is absolutely nothing in any decision of the Court indicating that the scope of review for arbitrated statutory claims is any different from any other arbitrated claims.

Fourth, Petitioner's argument is inconsistent and unduly narrow. He fails to explain why only arbitrated statutory employment discrimination claims, but not other arbitrated statutory claims, should be subject to a heightened standard of review, and none exists.

Finally, his argument that the Second Circuit "missed the point" that the arbitration Panel violated public policy by refusing to award him attorneys' fees is nothing more than: (1) a reformulation of his first point and fails for the reasons discussed above; and (2) an assertion that the Second Circuit misapplied the law to the facts.

Respondents respectfully request that the Court decline to exercise jurisdiction and deny the petition for a writ of certiorari.

## I.

**PETITIONER VIOLATED THE ORDERS OF THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS IN FILING HIS PETITION. IT SHOULD BE DEEMED A NULLITY AND DISMISSED AS UNTIMELY.**

Rule 13 of the Rules of the Supreme Court of the United States ("Supreme Court Rules") provides that:

> a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States court of appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.

Supreme Court Rules, Rule 13(1).

The Second Circuit entered its decision on August 5, 1997. DiRussa filed his petition on November 3, 1997 — the 90th day after the Second Circuit decision. Annexed to DiRussa's petition is, among other things: (1) the Judgment of the United States District Court, Southern District of New York; (2) DiRussa's Amended Complaint filed with the district court; and (3) DiRussa's Statement of Claim filed with the NASD. These documents remain sealed by the: (a) district court's: (i) Order of July 7, 1995; and (ii) July 24, 1996 Memorandum and Order; and (b) Second Circuit's: (i) October 28, 1996 Order; and (ii) August 5, 1997 decision.

Continuing in his disregard for those orders, DiRussa yet again did not file his petition under seal and has since cavalierly

admitted that in doing so he "technically violated the seal of the Second Circuit," and indeed has requested that Respondents waive their objections to such violation. (Respondents' Appendix ("Resp. App.") at 1a.) Respondents refused, and informed Petitioner that his noncompliance with those sealing orders rendered his petition a nullity. (Resp. App. at 3a-4a.) DiRussa quickly backpeddled and now asserts that "[w]e do not agree that there has been any violation of the Second Circuit Order." (Resp. App. at 5a.) Respondents demanded that he immediately take the steps necessary to comply with the district court and Second Circuit Orders. (Resp. App. at 7a-8a.) He finally indicated he would do so. (Resp. App. at 9a.) That, however, is not sufficient. It is too late.

Petitioner cannot ignore federal court orders. He is in violation of them. His petition for a writ of certiorari, which was not *properly* filed within 90 days of entry of the Second Circuit decision, should be deemed untimely, an infirmity which cannot be cured after the fact. It should be dismissed.[3]

## II.

## THERE EXISTS NO BASIS ON WHICH TO CONCLUDE THAT ARBITRAL AWARDS ARISING FROM DISCRIMINATION CLAIMS SHOULD BE SUBJECT TO A HEIGHTENED STANDARD OF REVIEW.

Rule 10 of the Rules of the Supreme Court of the United States makes clear that petitions for a writ of certiorari are granted only under the most compelling circumstances, as follows:

---

3. The amount of litigation between the parties at the district court and appellate levels on the issue pertaining to the Confidentiality Agreement and sealing the file belies any claim of oversight by DiRussa on this point.

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons . . .
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rules, Rule 10.

Petitioner contends that since "[t]he manifest disregard of law standard of review as applied by the Second Circuit in the case at bar is far too limited to achieve the effect intended by this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)" certiorari should be granted "to establish a standard of review of arbitration decisions which ensures that the promise of *Gilmer* is kept. . . ." (Pet. at 10,12.) Petitioner goes on to assert that a more lenient standard enunciated by the District of Columbia Circuit Court of Appeals in *Cole v. Burns International Security Services*, 105 F.3d 1465, 1487 (D.C. Cir. 1997) and one which according to that court "is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law" is the appropriate one to review arbitral decisions such as the one here. (Pet. at 10-11.) Petitioner, however, fails to note that he did not present this argument to the district court, but rather raised it for the first time before the Second Circuit. Since DiRussa had not properly preserved the argument below, the Second Circuit did not address this issue on the merits but rather held that he waived this argument. (Pet. App. at 7-8.)

Petitioner cannot obtain review of an issue that: (1) he failed to raise in the district court; (2) was deemed waived on appeal; and (3) the Second Circuit did not rule on. *See, e.g., Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 n.7 (1993); *United States v. Williams*, 504 U.S. 36, 40 (1992) (Supreme Court generally will not review an issue that "was not pressed or passed upon below" except in extraordinary circumstances); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 & 237 (1990); *Springfield v. Kibbe*, 480 U.S. 257, 258 (1987) ("[t]he standard we previously have employed is that we will not review a question not pressed or passed on by the courts below").[4]

---

4. Although the rule is stated in the disjunctive, that does not help Petitioner. While this issue was not passed upon below, Petitioner will most assuredly assert that it was at least pressed before the court of (Cont'd)

Notwithstanding this failure, Petitioner's request fails on the merits as well. First, this Court has already indicated that arbitration awards can be vacated if they are in " 'manifest disregard' of the law." *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (citation omitted); *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds, Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989). Thus, this Court has already established a standard of review of arbitration awards that ensures that employment discrimination victims are not denied the substantive statutory rights and remedies provided by Congress. Indeed, this standard had been articulated almost forty (40) years prior to the Court's decision in *Gilmer*, 500 U.S. at 32 n.4, in which it reiterated "that 'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." (Citations omitted.) Indeed, Petitioner's failure to receive his attorneys' fees was not the result of an overly limited standard of review, as he claims but, rather, his own failings in his presentation to the arbitral panel. As the Second Circuit properly noted:

> at no point did DiRussa communicate — either by written submission or orally — to the arbitrators that the ADEA *mandated* such an award to a prevailing party. Indeed in what is apparently the only brief DiRussa submitted to the arbitrators regarding attorney's fees, he focused on NJLAD's provisions regarding the "lodestar" calculation of attorney's fees

---

(Cont'd)
appeals. Respondent respectfully submits that to have properly pressed an argument below means to have done so before *both* the district and appellate courts. To permit review of issues by the court raised *for the first time* at the appellate level and not considered by that court would eviscerate the waiver rule relied upon by the Second Circuit and permit review of issues raised for the first time on appeal but not raised before the district court.

> and whether upward enhancement of that figure was warranted. Nowhere in this submission does DiRussa either explain that the ADEA *requires* an award of attorney's fees or quote the language of the relevant ADEA section, which clearly communicates that principle. In view of DiRussa's failure to inform the arbitrators of the relevant legal standard, we are hard-pressed to infer that they consciously disregarded the ADEA's fee provisions.

(Pet. App. at 10.) (emphasis in original)[5]

All DiRussa had to do was make such a statement and he would have received his fees either by the NASD panel or upon court review. He did not. DiRussa allowed the arbitration panel to believe they had the discretion to award fees. They proceeded to exercise that discretion. The manifest disregard of the law standard did not deny him his fees, but rather his own imprecision did. Whether in arbitration or a judicial forum, the law is replete with instances in which a party's own failure to preserve properly his or her rights acts as a waiver thereof. *See, e.g., PPG Indus., Inc. v. Webster Auto Parts, Inc.*, No. 96-7429, 1997 WL 643642 (2d Cir. Oct. 20, 1997) (through conduct in litigation party waived right to seek arbitration of dispute); *United Indus., Inc. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 766 (5th Cir. 1996) ("It is undisputed that United did not file a motion for attorneys' fees within fourteen days of entry of judgment as required by Rule 54(d). This failure to file within the allotted period serves as a waiver of its claim for attorneys' fees."); *Provident Bank v. Manor Steel Corp.*, 882 F.2d 258, 261 (7th Cir. 1989) ("we hold that when a matter has been referred to a magistrate, acting as a special master pursuant to 28 U.S.C. § 636(b)(2) and Fed. R. Civ. P. 53, a party waives his right to

5. DiRussa's presentation to the Panel on his request for attorneys' fees under the NJLAD was similarly lacking. (Pet. App. at 12-13.)

appeal if he has not preserved the issues for appeal by first presenting them to the district court as objections to the magistrate's report") (footnote omitted); *Mesa Petroleum Co. v. Coniglio*, 629 F.2d 1022, 1028-29 (5th Cir. 1980) (party waived a right to jury trial due to its failure timely to request same).

Second, while it is true that the Supreme Court has indicated that statutory rights are not surrendered when a party agrees to arbitrate and that judicial review, though limited, is sufficient to insure that arbitrators comply with the law, *Gilmer*, 500 U.S. at 28; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985), there is absolutely nothing in any Supreme Court decision which indicates that the scope of review for statutory claims is any different from any other arbitrated claims. *See Chisolm v. Kidder, Peabody Asset Mgt., Inc.*, 966 F. Supp. 218, 226-27 (S.D.N.Y. 1997).

Third, Petitioner's argument, citing Supreme Court cases involving a variety of different statutory claims varying from the Sherman Antitrust Act to the ADEA, is unduly narrow and inconsistent. He inexplicably asserts that only arbitral awards from employment discrimination claims but not other statutory claims require a heightened standard of review. (Pet. at 6-12.) However, there is absolutely nothing in the case law which supports this conclusion, and in fact in *Gilmer* this Court rejected the argument that civil rights claims, like those brought under the ADEA, somehow stood on a different footing and should be treated any differently than other statutory claims when it comes to arbitration. *Gilmer*, 500 U.S. at 27-29. Indeed, "[t]he Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 [under which claims can be arbitrated pursuant to a valid arbitration agreement] all are designed to advance important public policies." *Gilmer*, 500 U.S. at 28, as are the ADEA and other civil rights laws.

For the foregoing reasons, the Court should not exercise its discretionary jurisdiction to review this issue.[6]

## III.

## PETITIONER'S PUBLIC POLICY ARGUMENT IS NOTHING MORE THAN AN ASSERTION THAT THE SECOND CIRCUIT MISAPPLIED A PROPERLY STATED RULE OF LAW TO THE FACTS. THIS IS NOT SUFFICIENT TO WARRANT REVIEW BY THIS COURT.

Petitioner's second argument fares no better. He asserts that the Second Circuit decision conflicts with the Court's decision in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987). (Pet. at 12-18.) His request for certiorari on this point fails as well.

This argument is nothing more than a reformulation of his first one. He asserts that a standard of review less deferential than manifest disregard of the law is appropriate when certain narrow and limited statutory rights are involved. This argument fails for three reasons.

First, the Second Circuit declined to address that question because of DiRussa's failure to raise it at the district court level. (Pet. App. at 17.) DiRussa cannot now seek review of this issue.

Second, even if DiRussa had properly preserved that argument below, for the reasons discussed above, DiRussa has not proffered sufficient reason to modify the manifest disregard of the law standard.

Finally, DiRussa is really arguing that the Second Circuit's

---

6. Contrary to DiRussa's assertion, Dean Witter did in fact contest at the arbitration his entitlement to attorneys' fees.

decision, that the arbitral panel's refusal to award attorneys' fees does not per se violate public policy, conflicts with the Court's decision in *Misco*. There is no such conflict. The Second Circuit recognized and properly stated the correct rule of law as enunciated in *Misco*. What Petitioner is really arguing is that the Second Circuit misapplied a properly stated rule of law to the facts of this case. That is not sufficient to warrant review by the Court.

## CONCLUSION

For the foregoing reasons, Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

RONALD M. GREEN
*Counsel of Record*
EPSTEIN BECKER & GREEN, P.C.
*Attorneys for Respondents*
250 Park Avenue
New York, New York 10177-0077
(212) 351-4646

## APPENDIX A — CORRESPONDENCE BETWEEN THE PARTIES

**BARRY & McMORAN**
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

ONE NEWARK CENTER
NEWARK, NEW JERSEY 07102
(973) 624-6500
FAX: (973) 624-4052

Writer's Direct Dial
(973) 642-6830

Writer's Direct Fax
(973) 623-4605

November 7, 1997

Ronald M. Green, Esq.
Epstein, Becker and Green
250 Park Avenue
New York, New York 10177-0077

Re: *DiRussa v. Dean Witter*

Dear Mr. Green:

On Monday, November 3, 1997, we filed a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit in the United States Supreme Court. In so doing, we may have technically violated the seal of the Second Circuit since we included in the Appendix, the Arbitration demand, the Arbitration Award[1] and our Amended complaint in the District

---

1. As the Second Circuit pointed out, this award is available to the public through Westlaw.

Court. Of course, none of these items were covered by the Confidentiality Agreement of March 10, 1994.

We would ask that you agree to waive any claim of violation which may have been committed as a result of this filing. If you do, please so indicate on the enclosed copy of this letter and return it to us. If you do not agree to waive, please advise us promptly so that we may file an appropriate motion.

Very truly yours,
s/ Bruce P. McMoran
BRUCE P. MCMORAN

BPM/pl/204425

I agree to waive any claim of violation that may have occurred as a result of the filing of the Petition for a Writ of Certiorari.

Ronald M. Green, Esq.

*Appendix A*

**EPSTEIN BECKER & GREEN, P.C.**
ATTORNEYS AT LAW
250 PARK AVENUE
NEW YORK, NEW YORK 10177-0077†

(212) 351-4500
TELEX 5101008171
FAX: (212) 681-0989

DIRECT LINE
351-4646

November 13, 1997

*VIA TELECOPIER*

Bruce P. McMoran, Esq.
Barry & McMoran
One Newark Center
Newark, New Jersey 07102

Re: Raymond J. DiRussa v. Dean Witter Reynolds Inc.
and Lawrence J. Solari, Jr.
Docket No. 97-0773

Dear Mr. McMoran:

We are in receipt of your November 7, 1997 letter requesting that Respondents "agree to waive any claim of violation" which may have been committed as a result of the filing of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. Respondents agree that Petitioner violated the Second Circuit Order but disagree with

his assertion that "none of these items [referenced in the November 7 letter] were covered by the Confidentiality Agreement of March 10, 1994." Thus, respondents will not agree to waive Petitioner's violation. Moreover, Petitioner's failure to properly file this Petition under seal in the first instance, renders the filing a nullity which he cannot now, after the fact, cure. Thus, his Petition is now untimely.

Very truly yours,
s/ Ronald M. Green
Ronald M. Green

RMG: jlm

cc: Kenneth W. DiGia, Esq.

*Appendix A*

**BARRY & McMORAN**
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

ONE NEWARK CENTER
NEWARK, NEW JERSEY 07102
(973) 624-6500
FAX: (973) 624-4052

Writer's Direct Dial
(973) 642-6830

Writer's Direct Fax
(973) 623-4605

November 14, 1997

Ronald M. Green, Esq.
Epstein, Becker and Green
250 Park Avenue
New York, New York 10177-0077

Re: *DiRussa v. Dean Witter*

Dear Mr. Green:

We are in receipt of your November 13, 1997 letter. We do not agree that there has been any violation of the Second Circuit Order. The Arbitration Award is a public document available to all through Westlaw. Plaintiff's Amended Complaint and Arbitration Demand, of course, are not subject to any Confidentiality Agreement. Such documents were not obtained from defendants, but drafted by us.

We further disagree with your cliam that plaintiff's Petition is somehow "now untimely." The Petition was timely filed on

November 3, 1997 and was docketed by the Supreme Court on November 5, 1997. According to the Court's Notice that we previously provided to you, defendants' opposition brief is due on December 5, 1997.

Very truly yours,
s/ Bruce P. McMoran
BRUCE P. McMORAN

*Appendix A*

**EPSTEIN BECKER & GREEN, P.C.**
ATTORNEYS AT LAW
250 PARK AVENUE
NEW YORK, NEW YORK 10177-0077†

(212) 351-4500
TELEX 5101008171
FAX: (212) 681-0989

DIRECT LINE
351-4646

November 19, 1997

*VIA TELECOPIER*

Bruce P. McMoran, Esq.
Barry & McMoran
One Newark Center
Newark, New Jersey 07102

Re: Raymond J. DiRussa v. Dean Witter Reynolds Inc. and Lawrence J. Solari, Jr.
Docket No. 97-0773

Dear Mr. McMoran:

We are in receipt of your November 14, 1997 letter. The federal district court Orders, as affirmed by the United States Court of Appeals for the Second Circuit, are clear and unequivocal and impose upon Petitioner the duty to have filed his Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit under seal. Consequently, we

demand that you *immediately* take the steps required to comply with those Orders. Failure to do so will result in Respondents taking all steps necessary to protect their interests. We trust that will not be necessary.

Thank you for your anticipated cooperation.

Very truly yours,
s/ Ronald M. Green
Ronald M. Green

RMG: jlm
cc: Kenneth W. DiGia, Esq.

*Appendix A*

**BARRY & McMORAN**
A PROFESSIONAL CORPORATION
COUNSELLORS AT LAW

ONE NEWARK CENTER
NEWARK, NEW JERSEY 07102
(973) 624-6500
FAX: (973) 624-4052

Writer's Direct Dial
(973) 642-6830

Writer's Direct Fax
(973) 623-4605

November 21, 1997

Ronald M. Green, Esq.
Epstein, Becker and Green
250 Park Avenue
New York, New York 10177-0077

Re: *DiRussa v. Dean Witter*

Dear Mr. Green:

We are in receipt of your November 14, 1997 letter. As previously stated, we do not agree that there has been any violation of the Second Circuit Order. The Arbitration Award is a public document available to all through Westlaw. Plaintiff's Amended Complaint and Arbitration Demand were drafted by counsel. In any event, we will soon be filing an appropriate application with the court to resolve the issue.

Very truly yours,
s/ Bruce P. McMoran
BRUCE P. McMORAN

Supreme Court, U.S.
FILED
DEC 15 1997
CLERK

No. 97-773

In The

# Supreme Court of the United States

October Term, 1997

RAYMOND J. DIRUSSA,

*Petitioner,*

v.

DEAN WITTER REYNOLDS, INC.
and LAWRENCE J. SOLARI, JR.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## REPLY BRIEF

BRUCE P. MCMORAN
*Counsel of Record*
JOHN J. BARRY
MICHAEL F. O'CONNOR
BARRY AND MCMORAN, P.C.
One Newark Center
Newark, New Jersey 07102
(973) 624-6500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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## INTRODUCTION

*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) compelled employees who signed arbitration agreements to submit their statutory employment discrimination claims to arbitration rather than to the judicial forum created by statute. To ensure that claimants who submitted to arbitration did not lose their substantive statutory rights and remedies, the Court held that judicial review of arbitration awards would ensure arbitral compliance with statutory mandates. 500 U.S. at 32 n.4. Thereby, *Gilmer* intended to protect claimant's substantive rights and remedies from abridgement by arbitrators. The instant case presents the exact situation the *Gilmer* Court meant to prevent. Here, in a clear miscarriage of justice, the arbitration panel denied the claimant, Raymond J. DiRussa, the explicit, mandatory statutory remedy of attorney's fees.

Both the district court and the court of appeals agreed that a miscarriage of justice had occurred. Both courts expressly acknowledged that Mr. DiRussa should have been awarded attorney's fees. Both courts also recognized that no basis existed whatsoever for the arbitration panel to have denied him these fees. (Appendix to Petition for A Writ of Certiorari to the United States Court of Appeals for the Second Circuit dated November 3, 1997 ("Pet.App.") 8, 17). Indeed, even respondents concede that the arbitration panel should have awarded attorney's fees to Mr. DiRussa (Respondents' Brief in Opposition ("Opp.Br.") at 11). In essence, everyone agrees that Mr. DiRussa should have been awarded attorney's fees. However, both courts denied Mr. DiRussa attorney's fees. Both ruled that the injustice he suffered in

arbitration was not its problem, but was either the fault of the arbitration process or the result of perceived existing rules that limit court review of arbitration awards. (Pet.App. 11-12, 17, 25-27)

This result is manifestly unjust to Mr. DiRussa and undermines both the statutory enforcement mechanisms of the discrimination laws and the fairness and integrity of the system of compulsory arbitration the *Gilmer* Court endorsed. It creates the anomaly that arbitrators are free to disregard statutory mandates so long as they do so without a reasoned written opinion.[1] Results such as this have prompted public criticism of the fairness of arbitration proceedings in recent years.[2] Mr. DiRussa petitions this Court to rectify this anomaly by imposing a meaningful standard of review that would, at a minimum, curb the grossest injustices inflicted by the arbitration system that this Court has forced discrimination claimants to accept.

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[1] *Gilmer* presumed that the written opinion requirement of the NYSE rules would lead to reasoned written opinions that would provide a basis for effective review. 500 U.S. at 32 n.4. As this case demonstrates, that has not been the case. Because the ADEA mandates an award of attorney's fees to a successful claimant, the absence of a written opinion does not preclude review here on this issue. However, this absence affects Mr. DiRussa's other claims for relief, such as punitive damages, which the award fails to address despite the fact that respondent Solari's own secretary testified that Solari ordered her to backdate a fictitious memorandum, copy it, and shred the original, to make Mr. DiRussa's termination appear legitimate. (Pet.App. at 3).

[2] *See, e.g.*, Pamela Savage Forbat, "Employee v. Employer," REGISTERED REPRESENTATIVE, April 1997, 64-69.

This could be done as was argued below by adapting existing standards of review such as manifest disregard of law to correct clear non-compliance with Congressionally mandated requirements. Alternatively, this could be done by instituting, at a minimum, a standard historically employed by the Court to rectify errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings" – the plain error standard. *U.S. v. Atkinson*, 297 U.S. 157, 160 (1936). Institution of at least a plain error standard of review for arbitration of statutory employment discrimination cases would enhance the fairness and integrity of statutory claims, and thereby promote public confidence in arbitration as a forum for resolving statutory employment discrimination disputes. Under a plain error standard of review, a reviewing court would have the "latitude to correct particularly egregious errors on appeal . . . in those circumstances in which a miscarriage of justice would otherwise result." *U.S. v. Frady*, 456 U.S. 152, 163 (1982). In this case, application of a plain error standard of review would have permitted the courts below to correct the injustice that they recognized had occurred to Mr. DiRussa.

## I.

## THE COURT SHOULD ESTABLISH A MEANINGFUL STANDARD OF REVIEW FOR ARBITRATION OF STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS TO PROVIDE REVIEWING COURTS WITH THE POWER TO CORRECT PLAIN ARBITRAL ERROR THAT RESULTS IN A MISCARRIAGE OF JUSTICE TO ENHANCE THE FAIRNESS, INTEGRITY AND PUBLIC REPUTATION OF COMPULSORY ARBITRATION

A court may notice plain error when it "affects substantial rights" and "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Johnson v. United States*, ___ U.S. ___, 117 S.Ct. 1544, 1548 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 731 (1993)). This includes plain error committed in civil cases heard by the courts of appeals, *see, e.g., United States v. Virginia*, ___ U.S. ___, 116 S.Ct. 2264, 2286 (1996) (in gender discrimination case Fourth Circuit "plainly erred" in exposing Virginia's remedial plan to a deferential analysis); *Connor v. Flinch*, 431 U.S. 407, 421 n.19 (1977) (In race discrimination case, "this Court has the authority and the duty in exceptional circumstances to notice federal court errors to which no exception has been taken when they 'seriously affect the fairness, integrity or public reputation of judicial proceedings' ") (cites omitted); *Washington v. Davis*, 426 U.S. 229, 238-239 (1976) (D.C. Court of Appeals application of Title VII standards in race discrimination case was plain error), and the rule applies whether the issue was raised in the questions presented or below. *See* Rule 24.1(a); *Connor, supra*, 431 U.S. at 421 n.19.

No court would have *or could have* denied Mr. DiRussa's application for attorney's fees. As a successful

claimant, Mr. DiRussa was entitled to attorney's fees as a matter of law. If it had, a reviewing court would certainly have reversed that decision for plain error. The same result should obtain when an arbitration panel, rather than a district court, commits plain error by denying a successful age discrimination claimant a mandatory statutory remedy. Indeed, this is precisely what *Gilmer* intended to ensure by promising that arbitration decisions would comply with substantive statutory rights and promising effective review of arbitration decisions. 500 U.S. at 32 n.4.

The result here undermines *Gilmer*. By permitting the panel to deny Mr. DiRussa's statutorily mandated fees under the guise of the manifest disregard standard, the courts below elevated arbitrators above Article III judges and empowered them to ignore statutory and judicially-created rights that are beyond dispute. Because of the difference between the damages awarded to him by the panel and the amount of his attorney's fees, Mr. DiRussa is worse off than he would have been had he never instituted suit. This miscarriage of justice drastically undermines the fairness of arbitration proceedings and the integrity of discrimination laws. This Court should therefore grant certiorari and establish a standard of review that ensures that victims of discrimination do not lose substantive statutory remedies such as the ADEA's attorney's fees, rather than permit an unrestrained system that allows arbitrators to "fashion their own brand of industrial justice." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960).

Respondents, however, argue that the current practice should continue. That argument cannot be serious as

it is directly contrary to the position the securities industry took before this Court in *Gilmer* in arguing that discrimination victims' statutory rights and remedies would be protected in arbitration. Though they admit that the panel wrongfully denied Mr. DiRussa's application for attorney's fees (Opp.Br. at 11), respondents nonetheless insist that the very standard of review that has operated to deny that statutory remedy, manifest disregard of law, should be retained without modification. (Opp.Br. at 10).

One argument respondents make in opposition to certiorari is that by using the term entitled rather than mandatory, Mr. DiRussa "allowed the arbitration panel to believe they had the discretion to award fees," and that the use of entitled constituted a waiver of his right to attorney's fees. (Opp.Br. at 11) Respondents conveniently forget to include in this analysis their duty of candor to inform the panel that attorney's fees were mandatory. Rules of Professional Conduct 3.3(a)(3). And, obviously, Mr. DiRussa's use of the word entitled was not a waiver of his remedy of attorney's fees. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (waiver is the "intentional relinquishment or abandonment of a known right") (cite omitted).

Respondents also oppose certiorari on the ground that "there is absolutely nothing in any Supreme Court decision which indicates that the scope of review for statutory claims is any different from any other arbitrated claim." (Opp.Br. at 12) This is not so. Both *Gilmer* and *United Paperworkers Intern. Union, AFL-CIO v. Misco*, 484 U.S. 29, 43 (1987) hold that review of arbitration decisions ensures that discrimination victims do not lose statutory

rights by submitting to arbitration. However, respondents' position highlights the need for the Court's intervention on an issue of national importance. Indeed, the absence of a decisive ruling by the Supreme Court on this "important question of federal law" is one of the express grounds for granting certiorari provided by this Court's Rules. Rule 10(c).

## II.

## THE COURT SHOULD GRANT CERTIORARI BECAUSE OF THE CONFLICT BETWEEN *MISCO* AND THE COURT OF APPEALS' DECISION AND TO CLARIFY THE PUBLIC POLICY GROUND FOR REVERSING ARBITRATION AWARDS

Under *Misco, supra,* 484 U.S. at 43, courts may not enforce the award of arbitrators who, lacking the discretion to do so, deny a successful ADEA claimant his mandatory remedy of attorney's fees. The decision of the court of appeals upholding the panel's wrongful denial of Mr. DiRussa's application for attorney's fees is in direct conflict with the holding in *Misco.*

In light of this conflict, the court of appeals was uncertain of its own ruling. It stated, "Whether to vacate an arbitration award based on this type of broadly-stated public policy poses a difficult question, and it is far from clear under the cases cited above where to draw the line in determining whether the public policy allegedly violated is important enough to vacate an award." It distanced itself from its decision by stating, "The key issue is actually not whether to expand the 'public policy' ground for reversal of arbitration awards but whether a standard of review less deferential than 'manifest disregard' may

be appropriate when certain federal statutory rights are involved . . . " (Pet.App. 16-17).

The opinion of the court of appeals did more than simply misapply a stated rule of law, as respondents contend. The court of appeals passed on the nationally important issue of a reviewing court's power to invoke the *Misco* rule and produced a result that contradicts an express statutory provision – the ADEA's mandate on attorney's fees – as well as Supreme Court decisional law. Given the court of appeals' equivocation on this issue, and a result directly contrary to *Misco*, defendants are wrong to contend that this Court has no ground to review the decision of the court of appeals on this issue. Rather, the importance of the issue involved and the uncertainty of the scope of this ground for reversing arbitration decisions, as illustrated here and in *Misco* itself, 484 U.S. 29, 46 (1987) (Blackmun, J., concurring), compel the Court to grant certiorari.

## III.

## THE COURT SHOULD GRANT CERTIORARI BECAUSE MR. DIRUSSA RAISED THE FEDERAL QUESTION ON WHICH HE SEEKS SUPREME COURT REVIEW TO THE COURTS BELOW

Parties that appear before the Supreme Court on a federal question are not confined to the same arguments that were discussed below, so long as the same question is in issue. *Stevens v. Department of Treasury*, 500 U.S. 1, 8 (1991); *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899). For example, in *Stevens*, 500 U.S. at 8 (1991), the Court granted certiorari based on an argument that petitioner raised for the first time before the Court, because the

argument related to the substantive issue decided by the courts below – whether the petitioner filed his lawsuit in a timely fashion.

In his petition, Mr. DiRussa raised the same federal question he raised before the district court and the court of appeals: whether the panel could lawfully deprive him of his mandatory statutory remedy of attorney's fees. Therefore, under *Stevens, supra,* the Court should grant certiorari should it find that the question presented in the petition is worthy of certification. Moreover, the issue presented in the petition regarding the proper standard of review of plain arbitral error in the employment discrimination context is an important issue that has recurred in federal courts as a result of the prevalence of arbitration agreements. *See, e.g., Cole v. Burns International Security Services,* 105 F.3d 1465 (D.C.Cir. 1997); *Chisholm v. Kidder, Peabody Asset Management, Inc.,* 966 F.Supp. 218 (S.D.N.Y. 1997). It has been squarely presented and briefed by both parties. As such, this Court should review this case on certiorari. *Carlson v. Green,* 446 U.S. 14, 16 n.2 (1980); *see also U.S. v. Williams,* 504 U.S. 36, 44 (1992) ("It is permissible to undertake review of an important issue expressly decided by a federal court"); *Virginia Bankshares, Inc. v. Sandberg,* 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law").

Moreover, the Court's prudential rule that it will not consider a question that was not pressed or passed on below does not preclude review here. As Justice Scalia explained in *Williams,* 504 U.S. at 44, the Court's

"traditional rule – that it would not grant certiorari on a question that was 'not pressed or passed upon below,' " – "operates in the disjunctive." In this matter, Mr. DiRussa raised in his petition the same argument he made to the court of appeals. Thus, the petition satisfies the traditional rule. Moreover, it would be unreasonable to require Mr. DiRussa to have demanded the district court to establish a new less deferential standard of review as a condition for granting certiorari. *See Williams, supra,* 504 U.S. at 44.

Finally, if the Court agrees that either the panel or the courts below committed plain error, the Court may notice that error regardless of the underlying circumstances. *See also United States v. Virginia, supra,* 116 S.Ct. at 2286; *Connor v. Flinch, supra,* 431 U.S. at 421 n.19; and *Washington v. Davis, supra,* 426 U.S. at 238-239 (1976). Thus, there is no jurisdictional bar to certiorari.

## CONCLUSION

For the reasons stated in the Petition and above, the Court should grant petitioner Raymond J. DiRussa a writ of certiorari.

Respectfully submitted,

BRUCE P. MCMORAN
*Counsel of Record*
JOHN J. BARRY
MICHAEL F. O'CONNOR
BARRY & MCMORAN, P.C.
One Newark Center
Newark, New Jersey 07102
(973) 624-6500